83-1650

NO. _____

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IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

JONEZ P. SUTHOFF
FRANCES P. MILLER
INEZ W. PHILIBERT

PETITIONERS

VS.

YAZOO INDUSTRIAL DEVELOPMENT CORPORATION
YAZOO COUNTY, MISSISSIPPI
YAZOO COUNTY PORT COMMISSION
YAZOO CITY, MISSISSIPPI
YAZOO PUBLIC SERVICE COMMISSION
WILLIAM H. BARBOUR
TOM CAMPBELL, JR.
E. A. SMITH
WILLIAM T. NEELY
JOEL STEVENSON

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DIXON L. PYLES
(Counsel of Record)
PYLES & TUCKER
507 East Pearl Street
Jackson, Mississippi 39201
(601) 354-5668

ATTORNEYS FOR PETITIONERS

QUESTIONS TO BE PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit in Suthoff II could disregard, overrule and convert the previous holding in Suthoff I that the abusive governmental conduct of the respondents was sufficient to raise an ordinary tort to the stature of violations for deprivation of property under Amendments V and XIV to the United States Constitution and 42 U.S.C. § 1983, to "abuse of process" under Mississippi laws and apply the one year statute of limitations under § 15-1-35 (1972) Miss. 1972 Code annotated?

2. Whether the Fifth Circuit properly applied Mississippi's one year statute of limitations, § 15-1-35 (1972), to petitioners' causes of action, based on federal constitutional and statutory violations as a result of the breach of duties on the part of the respondent public officials in dealing with petitioners?

3. Did the district court and Fifth Circuit foreclose petitioners' suit before they had an opportunity to discover all of the essential elements of a cause of action by applying Mississippi rule as to "accrual" rather than the federal law?

4. Were the respondents estopped to invoke all statutes of limitation because of the existence of the confidential and fiduciary relationship existing with the petitioners?

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VS.

YAZOO COUNTY INDUSTRIAL DEVELOPMENT CORPORATION, ET AL.

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Jonez P. Suthoff, Frances P. Miller and Inez W. Philibert, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 22, 1983.

OPINIONS BELOW

The opinion (Suthoff II) of the Court of Appeals, not yet reported, appears in the Appendices as Appendix I hereto. The opinion of the District Court for the Southern District of Mississippi, appears as Appendix II; and the two judgments appear as Appendices III and IV, respectively. The opinion and judgment of the district court have not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on December 22, 1983. A timely petition for rehearing was filed; it was denied on February 17, 1984; and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is envoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Involved are the Fifth and Fourteenth Amendments to the Constitution of the United States. The full texts of constitutional amendments are set forth in the Appendices designed V and VI.

The federal statutes involved and the full texts and appendices designations are

(a) 42 U.S.C. § 1983, Appendix VII;

(b) 42 U.S.C. § 4651, Appendix VIII;

(c) 42 U.S.C. § 4655; Appendix IX.

Mississippi Code 1972 Annotation (MCA) provisions involved and set forth in the appendices are

(a) § 15-1-9. Limitations applicable to suits in equity to recover land. Appendix X;

(b) § 15-1-35. Limitations applicable to actions for certain torts. Appendix XI;

(c) § 15-1-39. Limitations applicable to actions involving certain trusts. Appendix XII:

(d) § 15-1-49. Limitations applicable to actions not otherwise specifically proved for. Appendix XIII;

(e) § 15-1-67. Effect of fraudulent concealment of cause of action. Appendix XIV;

(f) § 15-1-69. Commencement of new action subsequent to abatement or defeat of original action. Appendix XV.

STATEMENT OF THE CASE

On February 16, 1979, the petitioners brought an "inverse condemnation" action in the federal district court against five public agencies of Mississippi and five individuals. The complaint charged with specificity that the respondents entered into a conspiracy to force the petitioners to sell their private property at one-fourth its value to Yazoo County so that the property

could be used for public purposes by the Yazoo County Port Commission and the Yazoo County Industrial Development Corporation. The latter two public agencies did not have expropriation powers.

Yazoo City was induced to institute proceedings in the county court to expropriate 82.43 acres of the 122 acre tract of the petitioners property falsely claiming that the portion was to be used for sewerage disposal. The true and sole purpose was to coerce the petitioners into selling their property at a fraction of its value to the county. Yazoo City never had any intent to acquire the property for the announced purpose. In fact the city covertly dismissed the expropriation proceedings when it had served its coercive purpose.

Yazoo County "took" 22.75 acres for which no compensation was paid; and 99.25 acres were "taken" without just compensation. By the coercive tactics the respondents forced the private landowners to sell their

property at a price which was only one-fourth of its real value. Petitioners charged that 122.65 acres of their private property were wrongfully "taken" from them by Yazoo County for public use without just compensation in violation of Amendments V and XIV of the Constitution of the United States, and they were denied due process and the equal protection of the law.

Certain public officials and private persons conspired to misuse the expropriation powers of Yazoo City by institution of eminent domain proceedings with no intent to actually condemn, but solely to coerce the private landowners to sell their private property at a price far below the actual value to the conspirator entities who were not parties to the condemnation proceedings. Thus stating a claim under 42 U.S.C. § 1983 for deprivation under color of state law of individual federal constitutional rights. The allegations of the complaint were drawn so as to seek recovery under the federal

constitution and a federal statute. The petitioners also charged the respondents with fraud, deceit, abuse of process, and breach of a fiduciary trust. In the alternative, petitioners sued to recover the land, based upon the concealed fraud, deceit and coercion of the respondents.

On March 12, and 14, 1979, in Suthoff I, the respondents, seeking dismissal of the civil action, filed motions under Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure contending no subject matter jurisdiction or basis for a federal claim for relief existed. On June 22, 1979, the district judge filed his "Memorandum Opinion" (unreported) holding that the district court was without subject matter jurisdiction because no Fourteenth Amendment or federal statutory right was presented; the petitioners could present no facts sufficient to afford jurisdiction; no amendment of the complaint would be permitted; and the complaint was dismissed. On February 17, 1981,

the Court of Appeals for the Fifth Circuit reversed in an opinion reported at 637 F.2d 337. The petition for rehearing was denied. 642 F.2d 822.

The respondents contended in Suthoff I "[t]he complaint at most alleges a tort claim." 637 at p. 340. The Court of Appeals rejected the contention of the respondents in the following statement:

> "[W]e are not persuaded by these contentions. In the first place, the tort alleged, if such it be, was accomplished by an abuse of governmental power sufficient "'to raise an ordinary tort by a government agent to the stature of a violation of the Constitution.'" Williams v. Kelley, 624 F.2d 695, 697 (5th Cir. 1980). In the second place-for purposes of maintaining initial federal jurisdiction, even though the property itself is not actually "taken"-allegations that an individual's property rights have been damaged, through a municipality's arbitrary misuse of instituted but abandoned state-law expropriation proceedings, adequately state a claim of deprivation of property without due process of law in violation of the federal constitution. Foster v. Herley, 330 F.2d 87 (6th Cir. 1964). See also Thomas W. Garland, Inc. v. City of St. Louis, 596 F.2d 784 (8th Cir. 1979); cf., Chacon v. Granata, 515 F.2d 922, 924 (n.3)(5th Cir. 1975).

> '[t]aking the facts alleged in the complaint as true, the plaintiffs have established their right to a day in federal court...."

Id.

Respondents petitioned for a writ of certiorari. On January 11, 1982, the United States Supreme Court denied the petition. 102 S.Ct. 1032.

In Suthoff II, on November 23, 1983, all defendants moved for summary judgement claiming

> "'[T]he cause of action alleged in the complaint is barred by the Mississippi's six year statute of limitations ... § 15-1-49...'" and by "[t]he...one year statute of limitations...§ 15-1-35."

On January 5, 1983, respondents Barbour and Neely filed a separate motion for summary judgment based on res judicate. On January 24, 1983, the district judge, for the second time dismissed the complaint granting summary judgment.

In Suthoff II, the district court ruled

> "[s]ince this action is based on an intentional tort, the Mississippi one (1) year statute of limitations is

applicable and the action is barred as provided in § 15-1-35, Miss. Code Ann. (1972).

"[i]f mistaken as to the applicability of the one (1) year statute, then the Mississippi six (6) year statute of limitation is applicable as provided in § 15-1-49, Miss. Code Ann. (1972).

"[T]he Court finds inapplicable the ten (10) year statute dealing with bills for relief, (§ 15-1-39)..."

The district court ruled that the prior state court decision as to Barbour and Neely constituted res judicata and estopped the petitioners in the federal court. Appendix II.

As early as May, 1963, the Philibert property was being considered as a prospective industrial site and the development of a harbour and port on the Yazoo River. On December 1, 1969, the Yazoo County Industrial Development Corporation (YIDC) made plans to acquire the property and construct the plant with federal funds. On October 1, 1969, Mrs. Ida T. Page, mother of Mrs. E. A. Smith, deeded property contiguous to the Philibert property on the south to her daughter. In

Late in December 1969, E. A. Smith, an official of Yazoo City and another public official attempted to buy the Philibert property for their own use. The petitioners were unaware of interest of the public entities in the Philibert property. Mrs. Philibert refused the offer of Smith to purchase. On February 10, 1970, the petitioners learned for the first time of the interest of the public entities in the Philibert property when an offer to purchase the acreage for $97,600 was made. Philibert again refused to sell. Yazoo City was directed by the Air and Water Pollution Control to construct and have in operation a sewage disposal plant prior to April, 1972. Federal funds were made available for a portion of the cost of the plant. The pressure on Philibert to sell the property increased. On October 16, 1970, Mrs. Philibert deeded each of her two daughters a one-third interest in the property.

Early in 1971, the public was informed that plans were being made to construct and

operate a sewage disposal plant on the Philibert property.

On November 10, 1971, an article appeared in the People's Press, a newspaper, to the effect that YIDC requested Yazoo City to select another location for the sewage disposal plant because the plant on the Philibert property would damage the existing industrial area to the north of petitioners' property. Respondent William Barbour, was listed as an officer of YIDC. The article did not reveal that YIDC was attempting to acquire the Philibert property. Petitioners did not learn until after August 24, 1974, that YIDC was interested in acquiring the Philibert property for its own uses. Petitioners learned for the first time on January 25, 1979, that respondent William Barbour had been a charter member and official of YIDC since 1957, and that respondent Barbour's representation of the petitioners was in conflict with the interests of YIDC. Ted Russell, another official of YIDC, appraised

82.43 acres of the Philibert property sought by Yazoo City at $114,000.

By August 25, 1971, respondents had been informed that Yazoo City would receive a grant of federal funds amounting to 55% of the cost of the sewage disposal plant from the Environmental Protection Agency (EPA), and an additional 25% of from the Mississippi EPA.

On September 2, 1971, Yazoo City filed the coercive condemnation suit. The city offered only $22,500 for the 82.43 acres. The respondents wholly failed to comply with mandatory requirement of the "Uniform Relocation Assistance and Real Properties Act of 1970," and actively concealed the statutory requirements and regulations thereasto from the petitioners. The fact that the coerced purchase of the petitioners property on February 22, 1972, was subject to 42 U.S.C. §§ 4651 and 4655 (App. VIII and IX) did not become known to petitioners until the deposition of respondent Campbell in 1983.

On September 3, 1971, respondent Barbour agreed to become associated with Neely in the representation of the petitioners, and in the defense of the condemnation suit. The petitioners were not informed of Barbour's conflict of interest. Without informing petitioners, Barbour and Neely hired appraiser Joel Stevenson. The respondents did not have an accurate survey made. Respondents misled the petitioners with reference to the acreage conveyed. Petitioners were led to believe they were conveying only 99.25 acres. Barbour and Neely did not answer the condemnation suit or offer any defense. Without authority from and without informing petitioners, Barbour started negotiating for a sale of the Philibert property on behalf of the Port Authority, with the connivance of the other respondents. In a letter dated September 9, 1971, Neely informed Campbell that all negotiations regarding "the matter" would be handled by Barbour.

On October 8, 1971, Campbell wrote Houston Evans and told Evans he would get him a description of the property if Evans needed one. Houston Evans made his verbal appraisal without a legal description of the property. Campbell informed Evans that the YIDC and the Port Authority had an interest in the property down to Short Creek as an industrial park. Campbell told Evans of a meeting attended by William Barbour, where the Port Authority directed Barbour, lawyer for the petitioners, to get a price from Philibert and a price from Page for the properties. The Port Authority was to buy all the property, and sell to Yazoo City a location for the sewage disposal plant on Short Creek. Respondents once again ignored the requirements of the Property Acquisition Act of 1970.

Respondent Joel Stevenson's first appraisal was dated "October 8, 1971." The appraisal had been made "as of September 15, 1971." Stevenson completed gathering the

data for this appraisal prior to August 30, 1971. Stevenson reported that the legal description includes only 72.28 acres to be condemned, and 26.97 acres which would be left, after the taking. The 3.03 acre tract, which Stevenson says he subtracted from 30 acres to arrive at 26.97 acres, was not sold to McGraw Curran Lumber Company until September 20, 1971.

Stevenson's appraisal contains 12 substituted pages which included figures supplied by William Barbour for the substitution. Fraudulently concealed from the petitioners was Stevenson's appraisal. Neely and Barbour refused to show Stevenson's appraisal report to petitioners, although requested so to do on numerous occasions. Stevenson did not finish the appraisal and substitute the pages until after the conveyance of the property on February 22, 1972 although it is falsely dated "October 8, 1971."

On behalf of Yazoo City and the Port Authority, Barbour continued to negotiate for the sale of the Philibert property. On November 18, 1971, Bridgeforth reported to Campbell that Barbour was to see Philibert on the "first of next week" and then "we" can possibly do something. Bridgforth said he also gave this information to Jeppie (Mayor Barbour). The city allowed the condemnation complaint to remain filed while these negotiations were taking place in violation of federal rules and regulations pertaining to the Property Acquisition Act of 1970.

Fraudulently concealed from the petitioners was the fact that on January 3, 1972, Tom Campbell was ordered by the Mayor and Board of Aldermen to dismiss the condemnation suit filed against the petitioners herein with all costs to be paid by the city. Campbell did not dismiss the suit. This failure was also in violation of "Rules and Regulations of Property Acquisition Act of 1970."

On January 11, 1972, the Public Service Commission met. It was reported that the city would buy a site for the sewage disposal plant from the Port Authority or the YIDC whichever was the purchaser of the Philibert/ Page properties. The engineers were ordered to proceed with necessary changes in their plans to move the sewage disposal plant to the Short Creek site. Also, on January 11, 1972, it was reported to the Port Commission that agreements have been consumated with Philibert representatives for the purchase of the Philibert property, and such agreements and understandings were being prepared. Petitioners had no knowledge of such agreements.

On February 2, 1972, Barbour, Russell and Neely met with Philibert, Suthoff and Miller in the Suthoff home. Barbour had a prepared deed and disbursement sheet that he presented to petitioners. Barbour fraudulently told the petitioners, "The city will let you sell to the Port Commission for

$100,835 but it will continue the condemnation suit if you do not." He also said that petitioners could not get a fair trail in Yazoo County. Barbour told the petitioners that if the county did not have to pay the Corps of Engineers the $11,900 for the easement interest, he would personally see that they got that amount. The county has not had to pay for the easement. Petitioners have not received the $11,900.

Concealed from the petitioners was the fact that the legal description in the original deed did not close in one of the tracts to be conveyed. On February 15, 1972, Barbour mailed Neely substitute pages 3, 4 and 5 for insertion into the warranty deed. Petitioners did not learn of the substitution until 1983. Page four of the substituted pages contains a "Cover all Clause." Other changes were also made in the original deed. Neely and Barbour concealed all of this information from petitioners. On February 12, 1972, Barbour wrote to Neely

enclosing a deed to replace the original deed which he had left with Neely on February 2, 1972. Barbour stated that the "Deed was finally approved by Walter Bridgforth." None of these changes or substitutions made to the original deed which had been shown to the petitioners on February 2, 1972, were ever called to the attention of the petitioners. Petitioners were led to believe by Neely and Barbour that they were only conveying 99.25 acres instead of 122.65 acres as shown by the disbursement sheet prepared by Barbour.

On February 8, 1972, Bridgforth reported to the Port Commission that the public agency would acquire 118.65 acres of petitioners' property for $100,835. The value of 99.25 acres was represented to the petitioners as $100,835. The respondents acquired 23.4 acres of petitioners' property without any compensation. The 23.4 acres were valued at $93,600 on February 22, 1972.

Prior to signing the deed, Miller, Suthoff and Philibert went to Neely's office

and inquired about the condemnation suit. Neely falsely told the petitioners the suit was still pending, and said, "You can't fight City Hall."

Neely and Barbour occupied a confidential and fiduciary relationship with the petitioners. The petitioners reposed confidence in and relied on Neely and Barbour. The other respondents combined with, conspired and acted in concert with Neely and Barbour to deceive and defraud the petitioners. The respondents were guilty of actual and constructive fraud against the petitioners.

It was the obligation of Neely and Barbour to made full disclosure to petitioners of Barbour's official position with respondent YIDC, a public agency attempting to acquire the Philibert property. Neely and Barbour failed to disclose Barbour's official position with YIDC or that YIDC was an agency attempting to acquire the property. Petitioners would not have employed Barbour had

they been advised of his official connection with YIDC and of YIDC's interest in acquiring the property. Neely and Barbour fraudulently concealed Barbour's official position with respondent YIDC. Barbour should not have accepted employment to represent petitioners because the employment created a conflict of interest with his public responsibilities. Neely and Barbour fraudulently concealed the fact that the condemnation suit filed by the respondent Yazoo City had been ordered by the city on January 3, 1972, to be dismissed. Neely and Barbour fraudulently concealed from the petitioners that on January 11, 1972, the city had made the decision not to construct the sewage disposal plant on the Philibert property, but on the Page property; that the condemnation suit had been remanded to the files for lack of action on February 16, 1972. Neely and Barbour misrepresented the facts by fraudulently and falsely stating to petitioners that the city was going to try the condemnation suit to acquire their

property for the construction of the sewage disposal plant; that petitioners could not win the suit against Yazoo City in the Yazoo County Court; that petitioners would receive only $22,500 for the property if they did not agree to sell to described property to the Port Authority for $100,835. Neely and Barbour fraudulently concealed the alteration of the warranty deed shown to the petitioners on February 2, 1972, by surreptitiously substituting pages 3, 4 and 5 therein on February 15, 1972, and concealing the substitution from the petitioners.

In January, 1974, petitioner Suthoff, for the purpose of qualifying as a real estate sales person, took a course in this field. The prescribed manner of handling real estate sales as taught in the course was considerably different from the manner in which the sale of petitioners' property had been managed. Subsequent to August 24, 1974, through the efforts of attorney Grant Tharpe, petitioner Suthoff obtained from Neely a copy

of respondent Stevenson's appraisal report. The appraisal was very questionable. On January 25, 1979, the petitioners learned for the first time that respondent Barbour, since 1957, had been an officer of respondent YIDC. Prior to February 22, 1972, the petitioners owned 122.65 acres in the tracts taken by the respondents. The value of the 122.65 acres on February 22, 1972 was $490,600.

On February 21, 1978, petitioners Philibert, Suthoff, and Miller, pro se filed a civil action for damages in the circuit court of the First Judicial District of Hinds County against respondents Barbour and Neely. The suit was for malpractice based upon negligence. On April 4, 1978, a pleading designated "Joint General Demurrer" was filed by Barbour and Neely. This pleading was never served on the petitioners. No answer or any other written pleadings were filed in the state court. On October 9, 1978, the circuit judge wrongfully signed an order dismissing the petitioners' civil action.

The dismissal order recites that on October 9, 1978

> "[t]his cause having come on to be heard on the oral motion of defendants...for dismissal, and the defendants having appeared... and the plaintiffs having failed, neglected and refused to appear at said setting and the defendants having announced to the court their readiness to proceed...and it appearing unto the court that the motion is well taken and should be sustained... the cause should be and it is hereby, dismissed."

On October 23, 1978, the petitioners moved by verified motion to (1) set aside the wrongfully entered "Order of Dismissal"; (2) reinstate the cause of action to the docket; enter an order setting a hearing on the motions; (3) to strike the insufficient demurrers; and enter a default judgment against the defendants. The court entered its order, on October 23, 1978, that the motions of plaintiffs be set for hearing during the November 1978 term of the court on a date and time to be agreed on by the parties convenient for the court. No date was ever set for the motions and they are

presently pending. The court ordered that all pending motions be carried over for hearing and decision in vacation or the next term. The state court did not sustain the so called "Joint General Demurrers." The matter heard on October 9, 1979, was on the "[o]ral motion of defendants...for dismissal..."

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN SUTHOFF II CONFLICTS WITH THE DECISION IN SUTHOFF I

The Court of Appeals for the Fifth Circuit in Suthoff II (App. I) ruled

> "[T]he district court characterized the plaintiffs' action as one based on an intentional tort for which there existed an adequate remedy at common law, therefore finding applicable Mississippi's one-year limitations statute for intentional torts, Miss. Code Ann. § 15-1-35 (1972)...
>
> "[T]he cause of action under Mississippi law most analogous to the plaintiffs' claim is that of "abuse of process", being "the intentional use of legal process for an improper purpose incompatible with the lawful function of the process by one with an ulterior motive in doing so, and with resulting damages..."

> "[I]n our opinion the plaintiffs' complaint was properly characterized by the district court as alleging an action governed by Mississippi's one-year intentional tort statute..."

The decision of the Fifth Circuit in Suthoff II conflicts with the decision in Suthoff I, which held

> "[T]he plaintiffs had, inter alia, specifically alleged conduct of the defendants that had allegedly under color of state law deprived them of property rights without due process of law in violation of the Fifth and Fourteenth Amendments, citing as 42 USC § 1983...

Suthoff v. Yazoo Cty. Indus. Development Corp., 637 F.2d 337 (CA5 1981) at page 338, emphasis supplied

> "[1,2] Clearly the allegations of the complaint are drawn so as to seek recovery under both the federal constitution and a federal statute...(Id. at p. 339)

> "[S]ufficient to sustain § 1983 federal jurisdiction are allegations of concerted action by public and private persons to deprive individuals of federal constitutional rights under color of state law... A § 1983 action may be based on wrongful deprivation of property by persons acting under color of state law. Lynch v. Household Corp., 405 U.S. 538, 92 S.Ct 1113, 31 L Ed 2d 424 (1972). Action taken under color of state law may include '[m]isuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law,' Monroe v.

Pape, 365 U.S. 167, 184, 81 S.Ct. 473, 483, 5 L Ed 2d 492 (1961)...(Id. at p. 340).

"[t]hat the tort alleged, if such it be, was accomplished by an abuse of governmental power sufficient to 'raise an ordinary tort by a government agent to the stature of a violation of the constitution' William v. Kelley, 624 F.2d 695, 697 (5th Cir. 1980)...allegations that an individual's property rights have been damaged through a municipality's arbitrary misuse of instituted but abandoned state law expropriation proceedings, adequately state a claim of deprivation of property without due process of law in violation of the federal constitution. Foster v. Herley, 330 F.2d 87 (6th Cir. 1964). See also Thomas W. Garland, Inc. v. City of St. Louis, 596 F.2d 784, (8th Cir. 1979); cf. Chacan v. Granata, 515 F.2d 922, 924 (N.3) (5th Cir. 1975)..." (Id. at p. 340. Emphasis added).

In Suthoff I it is apparent that the Fifth Circuit found that the respondents committed on independent tort which was accomplished by abuse of government power sufficient to raise an ordinary tort to the stature of a violation of the constitution. The respondents actions with regard to the petitioners were intentional wrongs and abuses which amounted to an independent tort, and which evinced a ruthless disregard for

the rights of the petitioners.

In Suthoff II the court said

> "[B]ecause no statute of limitations was enacted to govern actions brought pursuant to § 1983, federal courts must "borrow" the state statute of limitation governing analogous causes of actions... The district court characterized the plaintiffs' action as one based on an intentional tort for which there existed an adequate remedy at common law, therefore finding applicable Mississippi's one year limitations statute for intentional torts, Miss. Code Ann. § 15-1-35 (1972)..."

On February 28, 1984, in the Southern District of Mississippi, District Court Judge Dan M. Russell, Jr. in Roy Harris v. Combined Insurance Company of North America, Civil Action No. S81-0553(R), and in Lonnie Lee Cuevas v. National Fire Insurance Company, Civil Action No. S82-0589(R), refused to apply the one year statute of limitations under § 15-1-35 because the statute contains an inclusive listing of "intentional torts" subject to the one year limitation period, and because under Mississippi decisions the

one year statute of limitations has no application to "independent torts" which embraces all torts not merely "intentional ones." The court said to apply the one year statute of limitations under § 15-1-35 (1972) would be overly restrictive and result in a misapplication of clear legislative intent. The district court denied the defendants' motions for summary judgment. The memoranda opinions in Harris and Cuevas are included in the Appendices as Appendix XVI and XVII, respectively.

The Fifth Circuit in Suthoff II "borrowed" the wrong Mississippi statute of limitations in selecting § 15-1-35 (1972).

2. THE DECISION IN SUTHOFF II CONFLICTS WITH OTHER DECISIONS OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

The decision in Suthoff II conflicts with the following decisions of the Court of Appeals for the Fifth Circuit:

(a) Morrell v. City of Picayune, 690 F.2d 469 (5th Cir. 1982);

(b) Shaw v. McCorkle, 537 F.2d 1289 (5th Cir. 1976);

(c) Harrison v. United States, 81-2501 rendered July 5, 1983 (5th Cir.) included in the Appendices as Appendix XVIII.

The decision in Suthoff II is in conflict with the decision of the Fifth Circuit in Morrell v. City of Picayune, 690 F.2d 469 (5th Cir. 1982). Morrell sued the City, its police department and various policemen, invoking 42 U.S.C. § 1983 and asserting constitutional rights. The district court concluded that the one year Mississippi limitations provision of § 15-1-35 (1972) governing actions for assault and battery applied. Since the action was filed 13 months after the incident, the district court granted summary judgment on the one year statute of limitations. The Fifth Circuit reversed stating that long ago the Mississippi Supreme Court determined that § 15-1-35

(1972) did not apply because the breaches of duty which all persons owe to every other person were not applicable to causes of action based on the breach of duties by public officials. The Fifth Circuit cited State for the use of Smith v. Smith, 156 Miss. 228, 125 So. 825, 826 (1930). The court said

> "[t]he square holding of the Mississippi court in Smith is that the one year statute governing actions for intentional torts by ordinary citizens does not apply to torts by police..."

Petitioners' action is against public entities and public officials. The district and Fifth Circuit courts both disregarded the Mississippi rule that intentional torts by ordinary citizens does not apply to governmental bodies and officials.

The decision in Suthoff II conflicts with the decision in Shaw v. McCorkle, 537 F.2d 1289 (5th Cir. 1976). In Suthoff I the court said that petitioners sought recovery under the federal constitution and 42 U.S.C. § 1983. Since § 1983 is a federally-created

right of action, the Fifth Circuit was duty bound to ultimately ground its choice of which Mississippi statute of limitations should apply on the basis of which statute would best effectuate the Congressional policies underlying § 1983.

The Fifth Circuit in Suthoff II defined the nature of petitioners' multi-claims as an "abuse of process," and without any basis, applied the one year statute of limitations under § 15-1-35 (1972). "Federal policy neither requires nor allows the federal courts to define the nature of the actions in one mold for purposes of determining the statutory period..." Beard v. Stephens, 372 F.2d 685, 690 (5CA 1967).

In McCorkle, the court described a two step process to find the most analogous cause of action. The first step is the determination based on federal law of the essential nature of the federal claim. The second step is to determine the state statute of limitations most applicable to the federal

claim. In McCorkle the court refused to apply the one year statute of limitation to § 1983 under the two step process. The court also considered a one step process which asked which limitation period the state would have enforced had the petitioners brought the claims for redress of constitutional tort and 1983 actions in the state court. Under the one step method the Fifth Circuit also refused to apply the one year statute of limitations in McCorkle.

The decision of the Court of Appeals for the Fifth Circuit in Suthoff II conflicts with Harrison v. United States, No. 81-2501 (5th Cir. 1983).

The district court dismissed Harrison's suit as barred by the two year statute of limitations of the Federal Tort Claims Act. The Fifth Circuit reversed and remanded and said it was essential to distinguish between "knowledge" and "belief", and conclusions based on intuitions, suspicion, conjecture, speculation, or faulty reasoning, even if

true do not rise to the level of knowledge. Prior to August 24, 1974, the petitioners had only beliefs and suspicions that they had not been treated properly.

In Harrison the plaintiff consulted doctors and a lawyer in an attempt to determine whether she had a cause of action. The petitioners in Suthoff II consulted lawyers, engineers and appraisers in an attempt to determine what their rights were and whether they had a cause of action.

Prior to August, 1974, petitioners consulted several lawyers in an attempt to determine whether they had a cause of action. They sought advice from lawyers based purely on their suspicions, just as did Harrison in her consultation with doctors. Each attorney whom the petitioners consulted informed them that they did not have sufficient basis to file a law suit. The lawyers told the petitioners that they found no basis for legal action on the intuitive conclusions which petitioners expressed relative to the fraud

and deceit to which they suspected they had been subjected.

The petitioners obtained certain records and appraisals after August, 1974, but in respect to filing their civil action, they continued to run into a stonewall as did Harrison. The best legal advice the petitioners could secure from February 16, 1972, until August 24, 1974, was of no assistance to them in determining whether a suit against the respondents could be successfully prosecuted. All of the lawyers whom the petitioners consulted said they had no injury nor a basis for a cause of action against the respondents. The petitioners were unable to provide persuasive information of injury or causation to the lawyers whom they consulted, because the petitioners were not conversant with the legal procedures, and they had been unable to obtain sufficient facts to warrant the filing of a suit prior to February 16, 1979.

Prior to August 24, 1974, the only direct evidence sufficient to justify legal action was contained in the records under the control of and in the knowledge of the respondents, so that the petitioners and the lawyers whom they consulted could do no more than speculate on the possible source of an injury and cause of action. The injury and causes of action were not overlooked, they were hidden from the petitioner.

The court in Suthoff II said "[i]t is the concealment of the cause of action that acts to toll the running of the limitation period..." In Harrison the Fifth Circuit pointed out that the statute does not begin to run until the plaintiff discovers or in the exercise of reasonable diligence should discover her injury and its cause. (Harrison, p. 5554). The petitioners must have had knowledge of facts that would lead a reasonable person to (a) conclude that there was a causal connection between the acts of all of the respondents and petitioners'

injuries or (b) seek professional advice, and then with that advice, to conclude that there was a causal connection between the actions of the respondents and their injuries. (Id.) The petitioners consulted four lawyers between February 22, 1972 and August 24, 1974, who advised them that on the facts in petitioners' possession there was no basis to conclude there was an injury or a causal connection to justify a suit being filed.

The court in Suthoff II failed to distinguish between "knowledge" and "belief." This distinction is an explicit and essential requirement as set forth in Harrison. (p. 5554).

Prior to August 24, 1974, the petitioners had only

> "[c]onclusions based on dreams, intuitions, suspicions, conjecture, ESP, or faulty reasoning, (which) even if true are merely 'belief.' Absent of a reasonable basis these conclusions do not rise to the level of knowledge." (Id.)

In Suthoff II the court did not distinguish between knowledge and mere belief.

The factual situation in Harrison is closely analogous to the facts in Suthoff II, and "The Law" set forth in the opinion of the Fifth Circuit is "The Law" which should have been applied, but was not.

In Harrison, the Fifth Circuit said:

> [4,5] The situation Harrison faced is exactly the type of situation referred to by Justice White in United States v. Kubrick, when he observed that "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." 444 U.S. at 122, 100 S.Ct. at 359. In such an instance other conditions being met, the statute of limitations is tolled. (Emphasis Supplied)

The Fifth Circuit refused to apply the rule announced in Kubrick to Suthoff II.

The panel decision in Suthoff II conflicts with Lavellee v. Listi, 611 F.2d 1129. The district court sustained the defendants' motion for summary judgment on the one year prescription period provided by Louisiana law and dismissed Levelle's § 1983 claim. The Fifth Circuit reversed in part holding that the district court erred in applying Louisiana law instead of federal law to determine

when the cause of action accrued in Levelle's civil rights suit.

The Fifth Circuit in Suthoff II rendered a decision which allows the statute of limitation to commence running before the petitioners were or should have been aware of the causal connection between their injuries and the acts of the respondents. Petitioners were not even aware of the names of all of the respondents and the part which the public agency respondents played in causing injury to them until shortly before February 16, 1979.

Mississippi's "borrowed" statute of limitations should have been tolled by the district and appellant courts in conformity with federal doctrine where the rights sought to be vindicated are creatures of the federal constitution and statute. The established rule is that where the petitioners were injured by fraud or concealment and remained in ignorance thereof until subsequent to August 24, 1974, without any fault or want of

diligence on their part until their discovery of the injury done them, then the limitation period did not commence to run until petitioners discovered the fraud. Briley v. State of Cal., 564 F.2d 849, 855 (9th Cir. 1977). In light of the prevailing federal doctrine as to fraud and concealment, the broad remedial policies of § 1983 are best served by holding that Mississippi's limitation period did not commence to run until petitioners discovered the fraud or could have done so by the exercise of reasonable diligence.

3. THE DECISION OF THE FIFTH CIRCUIT IN SUTHOFF II AS TO WHEN PETITIONERS' CLAIMS ACCRUED CONFLICTS WITH THE DECISIONS IN COURTS OF APPEALS IN OTHER CIRCUITS

The issue as to whether it was proper to grant summary judgment on the question of when petitioners' claims accrued under the circumstances of this case is in itself sufficient to preclude the summary judgment. It is admitted that there are many disputed factual issues, but the Fifth Circuit ruled

summary judgment was proper on the narrow issue of the statute of limitations. The decision conflicts with the decisions in the courts of appeals in other circuits.

The Congress did not set a tolling period for § 1983 actions. Mississippi's law concerning time of accrual is in no sense "loaned" to the body of federal civil rights law. The point at which a § 1983 claim accrues as well as the time of accrual is a question of federal law. Portis v. United States, 483 F.2d 670, 672 n.4 (4th Cir. 1973). The Fifth Circuit made the determination on the basis of Mississippi law holding that the petitioners' rights of action accrued on February 22, 1972, when the deed was executed.

In Exnicious v. United States, 563 F.2d 418, the district court rendered summary judgment on the ground that the action for malpractice was time barred. The district court concluded that in May, 1972, the plaintiff discovered acts construing the

alleged malpractice which was more than two years before filing his claim. Under the federal rule a claim accrues when the claimant discovers or in the exercise of reasonable diligence should have discovered the alleged malpractice.

> "[L]imitations should not bar a claimant before he has a reasonable basis for believing he has a claim. Therefore until a claimant has a reasonable opportunity to discover all of the essential elements of a possible cause of action ... - damages, duty, breach and causation - his claim...does not accrue. Bridgford v. United States, 550 F.2d 978, 981-82 (4th Cir.). And where a claimant is given a "credible explanation" of his condition not pointing to malpractice, he may not be found to have failed to exercise reasonable diligence because he did not earlier pursue his claim. Jordon v. United States, 503 F.2d 620, 624 (6th Cir.). (Emphasis Supplied; fn.7 omitted).

The summary judgment papers must be viewed in the light most favorable to the petitioners, and the court was duty bound to consider factual inferences in the light most favorable to petitioners, and to consider all factual inferences in the light most favorable to the existence of such issues. The

respondents are required to demonstrate entitlement beyond a reasonable doubt, and if an inference can be deduced from the facts on which the petitioners might recover, summary judgment is inappropriate. In a case such as this it must appear conclusively from the record that the petitioners knew or should have known of the alleged wrongdoing of all of the respondents at a time beyond the limitation for summary judgment to be granted. It reasonably could be inferred that the statement to petitioners that if they did not accept the offer of $100,830 to purchase their property made by Yazoo County, they would receive only $22,500 in the condemnation trial, did not put the petitioners on notice that the respondents were conspiring to defraud them and acquire their property for less than a fourth of its value, and that the conspiracy was the cause of their problems. On February 22, 1972, the petitioners were aware only that Yazoo City was attempting to get their property. There

was nothing which conclusively showed that the statement that petitioners "could not fight city hall" could not reasonably have been accepted as a credible explanation for the statement of Barbour and Neely with no indication that the respondents had entered into a conspiracy to misuse the municipality's expropriation powers, by institution of proceedings not intended to condemn, in order to coerce the petitioners to sell their property at prices far below its value to entities not authorized by law to expropriate property. There was nothing on February 22, 1972, which conclusively showed to petitioners that the respondents were taking their property by so abusing the combined power of the governmental entities sufficient to raise the abuse to a violation of the Constitution of the United States and deprive them of their property without due process of law. The factual questions as to when petitioners had a reasonable opportunity to discover all the elements of a possible

cause of action - duty, breach, causation and damage are not so conclusively removed that summary judgment is proper. The rights given under the constitutional provisions and § 1983, allowing the suit, as stated in Suthoff I, are not served by barring the claims in Suthoff II, if petitioners' delay resulted from "blameless ignorance." Urie v. Thompson, 337 U.S. 163, 170, 69 S.Ct. 1018, 93 L.Ed 1282. When different ultimate inferences may be drawn, the case is not one for summary judgment. United States v. Diebold, Inc., 396 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed 2d 176; Webb v. Allstate Life Ins. Co., 536 F.2d 336, 339 (10th Cir.)

In Bridgford v. United States, 550 F.2d 978 (4th Cir. 1977), the court said that statutes of limitations governing tort actions should not operate to foreclose a suit before a potential claimant has a reasonable basis for believing that he has a possible cause of action; hence, until a claimant has had a reasonable opportunity to

discover all of the essential elements of a possible cause of action, i.e., duty, breach, causation and damages, his claim does not accrue.

In Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975), the district court granted judgment on the pleadings for the defendants holding, inter alia that her damage claim was barred by the North Carolina statute of limitations. The Court of Appeals for the Fourth Circuit concluded that the district court chose the correct statute of limitations but incorrectly applied it. As was done in Suthoff II, the district court in Cox applied state law to decide when plaintiff's cause of action accrued, and determined that plaintiff's cause of action accrued at the time of the sterilization operation, and consequently the three year limitation period had run before the suit was filed. In Suthoff II, the district and the Fifth Circuit courts improperly concluded the petitioners' cause of action accrued February 22, 1972, when the

warranty deed was signed and delivered. In Cox, the Fourth Circuit said

> "[F]ederal law holds that the time of accrual is when plaintiff knows or has reason to know of the injury which is the basis of the action...
>
> "[O]ur conclusion is buttressed by Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed 1282 (1963)..."

529 F.2d at p. 50

Under federal law the petitioners did not know of their injury until subsequent to August 24, 1974. The § 1983 action was timely filed.

In De Witt v. United States, 593 F.2d 276 (6th Cir. 1974), it is pointed out that the Third, Fourth, Sixth and Tenth Circuits recognize that statutes of limitations do not begin to run until the claimant has discovered, or has had a reasonable opportunity to discover, all essential elements of a possible cause of action.

The date when a cause of action accrues is a question of fact. Summary judgment is usually inappropriate on that question. In

Suthoff II, the district and Fifth Circuit Courts inappropriately determined there was no genuine issue of fact as to whether petitioners' cause of action had accrued on Feburary 22, 1972.

4. THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT CONFLICTS WITH DECISIONS OF THE SUPREME COURT OF THE UNITED STATES AND RAISES SIGNIFICANT AND RECURRING PROBLEMS ON THE ACCRUAL OF A CAUSE OF ACTION UNDER THE CONSTITUTION OF THE UNITED STATES AND § 1983

The decision of the Court of Appeals for the Fifth Circuit in Suthoff II conflicts with decisions of the United States Supreme Court.

In United States v. Kubrick, 1979, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed 2d 259, the supreme court held that a claim accrues when the plaintiff knows both the existence of and the cause of his injury. The district and Fifth Circuit courts ruled on the basis of Mississippi law that petitioners' "abuse of process" cause of action accrued on February

22, 1972, when the deed was signed and delivered. On that date the petitioners did not know that they had been paid only one fourth of the value of their property taken for public use nor were they aware that the cause of their injury was the conspiratorial acts of the respondents. In fact, the petitioners did not even know who were conspirators on February 22, 1972. This knowledge did not come into the possession of the petitioners until subsequent to August 24, 1974.

In Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed 1282, 11 ALR 2d 252 (1949), the court held that a claim under the Federal Employers' Liability Act (FELA) did not accrue until plaintiff's injury manifested itself. The court refused to charge Urie with the "unknown and inherently unknowable" and held because of his "blameless ignorance" of the fact of his injury, his claim did not accrue under the FELA until the disease of silicosis manifested itself. 337

U.S. at 169, 170. The Urie doctrine has been applied to other claims, and it should be applied to § 1983 claims. Petitioners' § 1983 claims should be construed as not intended to run until the petitioners had in fact discovered that they had suffered injury (loss of three-fourths of the value of their property) or by the exercise of reasonable diligence they should have discovered the loss. The rule is a general rule and should be applied in cases of fraud and deceit.

The opinion of the Fifth Circuit in Suthoff II reflects and focuses on policy considerations growing out of the increasing number of courts utilizing in an unwarranted manner the combination of summary judgment procedure and statutes of limitations to improperly dispose of cases. The statutes of limitations were never intended to do away with the rule of "blameless ignorance."

The correctness of the decision of the Fifth Circuit is open to serious question. The evidence in the record show that the

complaint filed on February 16, 1979, was filed approximately four and a half years after August 24, 1974, the earliest date when it can be said petitioners became aware of their injury them and the cause thereof.

The relationship of the petitioners and the respondents was fiduciary in nature, and of a delicate, exacting and confidential character requiring of all defendants a high degree of fidelity and good faith. Gay v. Heller, 252 F.2d 313 (5th Cir. 1958). The relationship created a constructive trust. The breach of the respondents' duty of fidelity to the interest of the petitioners constituted constructive fraud. Fiske v. Buder, 125 F.2d 841 (5th Cir. 1942).

Section 15-1-39 (1972) was ignored by the Fifth Circuit in Suthoff II. The statute provides that suits in cases of the existence of a trust not cognizable by courts of common law and in all other cases not provided for shall be filed in ten years after the cause of action accrued. Robinson v. Strauther, 64

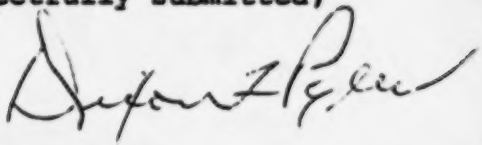
So. 724, 726 (Miss. 1914).

The respondents are estopped to invoke any statute of limitations because of the existence of the confidential and fiduciary relationship with petitioners. The doctrine of equitable estoppel is applicable to respondents in Suthoff II to prevent a fraudulent or inequitable resort to the statutes of limitations. 51 Am Jur 2d, Limitation of Actions, § 431; 45 ALR 3d 630 Annotation: Fiduciary or confidential relationship as affecting estoppel to plead statute of limitations.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,



DIXON L. PYLES
(Counsel of Record)
PYLES & TUCKER
507 East Pearl Street
Jackson, Mississippi 39201
(601) 354-5668

Counsel for Petitioners

Dated: April , 1984

CERTIFICATE

The undersigned certifies that on the date set forth hereinafter, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to

VARDAMAN S. DUNN
Post Office Box 1046
Jackson, Mississippi 39205

WATKINS & EAGER
Post Office Box 650
Jackson, Mississippi 39205

HALEY BARBOUR
Post Office Box 960
Yazoo City, Mississippi 39194

Counsel for Respondents

The undersigned further certifies that all parties required to be served have been served.

DIXON L. PYLES
PYLES & TUCKER
507 East Pearl Street
Jackson, Mississippi 39201
(601) 354-5668

Counsel for Petitioners

Dated: April , 1984

88-1650

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
COURT CLERK

NO. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

JONEZ P. SUTHOFF
FRANCES P. MILLER
INEZ W. PHILIBERT

PETITIONERS

VS.

YAZOO INDUSTRIAL DEVELOPMENT CORPORATION
YAZOO COUNTY, MISSISSIPPI
YAZOO COUNTY PORT COMMISSION
YAZOO CITY, MISSISSIPPI
YAZOO PUBLIC SERVICE COMMISSION
WILLIAM H. BARBOUR
TOM CAMPBELL, JR.
E. A. SMITH
WILLIAM T. NEELY
JOEL STEVENSON

RESPONDENTS

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

DIXON L. PYLES
(Counsel of Record)
507 East Pearl Street
Jackson, Mississippi 39201
(601) 354-5668

ATTONERYS FOR PETITIONERS

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APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 83-4115

JONEZ P. SUTHOFF, ET AL.,

Plaintiffs-Appellants

VS.

YAZOO COUNTY INDUSTRIAL
DEVELOPMENT CORPORATION,
ET AL.,

Defendants-Appellees

Appeal from the United States District
Court for the Southern District of
Mississippi

(December 22, 1983)

Before COLEMAN, GARZA, and HIGGINBOTHAM,
Circuit Judges.

GARZA, Circuit Judge:

Plaintiffs brought this action pursuant to 42 U.S.C. § 1983, alleging the deprivation of property rights under the Fifth and Fourteenth Amendments to the Constitution.

Plaintiffs appeal from the summary judgment granted defendants by the district court.

FACTS AND PROCEEDINGS BELOW

Plaintiff Inez Philibert was the owner of approximately 122 acres of land in Yazoo County, Mississippi. In January of 1970, E. A. Smith, a member of the Yazoo Public Service Commission (PSC), accompanied by an attorney acting for the Yazoo County Port Commission (Port Commission), visited Philibert and offered to purchase the property for $97,600. Philibert refused the offer, stating that she was not interested in selling the property . Smith contacted Philibert a number of times thereafter in an attempt to persuade her to sell the property, all to no avail. During this time, Philibert had retained attorney William Neely to represent her interests in her dealings with the land. Philibert alleges that in the late summer of that year, Smith again approached her, stating that if she continued to refuse to sell

the property, condemnation proceedings would be initiated and she would receive only a fraction of what he was offering her for the land. Philibert steadfastly refused to change her position.

On October 16, 1970, Philibert conveyed one-third undivided interests in the 122 acres to each of her two daughters, plaintiffs Suthoff and Miller. Attorney Neely agreed to represent their interests in the property as well.

In August, 1971, Tom Campbell, Jr., attorney for Yazoo City and the PSC, met with Philibert, Suthoff and Miller. He told them that an appraiser for Yazoo City had valued their property at $250 per acres, and he offered to buy 82.43 acres of the property for the sum of $22,500. This offer was likewise rejected. On September 2, 1971, Campbell filed a condemnation action on behalf of Yazoo City against Philibert, Suthoff and Miller, seeking to have 82.43 acres

of the property condemned for use in the construction and operation of a sewage treatment facility. On attorney Neely's advice, the women thereupon employed attorney William Barbour to associate with Neely in the representation of their interests in the property. Barbour was a board member of the Yazoo County Industrial Development Corporation (YIDC), and a member of its Executive Committee (a fact which plaintiffs claim not to have learned until 1979).

Barbour and Neely hired appraiser Joel Stevenson to appraise their client's property. In a letter dated October 8, 1971, Stevenson stated that as of September of that year, 99.25 acres of the plaintiff's property had a value of $100,850. Plaintiffs claim that they were refused a copy of Stevenson's appraisal. Plaintiffs allege that the property was actually worth more than $4,000 per acre, but that Barbour, acting in concert with the other defendants, had instructed Stevenson to report the lower

value to enable the defendants to purchase the property for less than one-fourth its actual value.

Plaintiffs further claim that attorneys Barbour and Neely told them, in effect, that they "could not fight city hall," and that if they did not sell the property to Yazoo County for $100,835, the Yazoo County Court would order it sold to Yazoo City for only $22,500. Under this belief, the plaintiffs deeded the entire 122 acres to Yazoo County on February 22, 1972, for $100,835, apparently believing they were conveying title to only 99.25 acres. Unknown to them, the condemnation action had been dismissed at Yazoo City's request on February 16, 1972.

Plaintiffs filed this action on February 16, 1979, almost seven years after the sale, seeking compensatory and punitive damages against Yazoo City, Yazoo County, the Yazoo Port Commission, YIDC and PSC; also, against E.A. Smith, attorneys Barbour, Neely and Campbell, and appraiser Stevenson.

Plaintiffs alleged numerous causes of action, including the deprivation of property without due process, fraud, deceit, abuse of process and breach of a fiduciary trust, and in the alternative for recission of the deed. The district court dismissed the complaint as failing to state a claim over which it had subject matter jurisdiction. We reversed and remanded, holding that the pleadings sufficiently alleged a federal claim within the district court's jurisdiction. See Suthoff v. Yazoo County Industrial Development Corporation., 637 F 2d 337 (5th Cir.), reh denied per curiam, 642 F 2d 822 (5th Cir. 1981).

On remand, after extensive discovery was had, the district court granted summary judgment in favor of all defendants. The court held that the action as against each defendant was barred by limitations; furthermore, that the doctrine of res judicata acted to bar the action against attorneys

Barbour and Neely. We are called upon in this appeal to decide which of Mississippi's statutes of limitations apply to this action, and whether the application of that statute or statutes acts as a bar to the prosecution of the action.

I.

Plaintiffs' complaint alleges claims arising under state law and under § 1983. Because no statute of limitations was specifically enacted to govern actions brought pursuant to § 1983, federal courts must "borrow" the state statute of limitations governing analogous causes of action. Board of Regents v. Tomanio, 446 U.S. 478 (1980); Drayden v. Needville Independent School District, 642 F 2d 129, 131 (5th Cir. 1981); Braden v. Texas A & M University System, 636 F 2d 90,92 (5th Cir. 1981). The district court characterized the plaintiffs' action as one based on an intentional tort for which there existed an adequate

remedy at common law, therefore finding applicable Mississippi's one-year limitations statute for intentional torts, Miss. Code Ann. §15-1-35(1972). That statute provides:

> All actions for assalt, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words, concerning the person or title, and for libels, shall be commenced within one year next after the cause of such action accrued, and not after.

The district court further stated that if it was incorrect in this regard, the action was nonetheless barred by Mississippi's six-year statute governing actions not otherwise specifically provided for, Miss. Code Ann. § 15-1-49 (1972)[1].

In determining which state limitations period controls, we must look to the essential nature, or "gravamen", of the complaint. Prince v. Wallace, 568 F 2d 1176 (5th Cir. 1978); Boshell v. Alabama Mental Health Board, 473 F 2d 1369 (5th Cir. 1973). Looking to the substance of the complaint in this instance, the plaintiffs allege that

the defendants conspired to have Yazoo City initiate proceedings to expropriate the plaintiffs' property for sewerage purposes, in order to coerce plaintiffs into selling their property at a fraction of its value to Yazoo County. This was allegedly done to enable the Port Commission and the YIDC to utilize the property for public purposes. The cause of action under Mississippi law most analogous to the plaintiffs' claim is that of "abuse of process", being "the intentional use of legal process for an improper purpose incompatible with the lawful function of the process by one with an ulterior motive in doing so, and with resulting damages." Hyde Construction Co., Inc. v. Koehring Company, 387 F Supp 702, 712-13(S.D. Miss. 1974), modified but cited with approval sub nom., Dunn v. Koehring Company, 546 F 2d 1193, 1199 n.19 (5th Cir.), modified sub nom., Hyde Construction Co., Inc. v. Koehring Co., 551 F 2d 73 (5th Cir.

1977); See also Wilcon, Inc. v. Travelers Indem. Co. 654 F 2d 976, 983-84 (5th Cir. 1981).

Review Mississippi's various limitations statutes, only two appear to have possible application to actions brought for abuse of process. They are Miss. Code Ann. § 15-1-35 (1972), providing the one-year period for intentional torts found applicable by the district court; and, Miss. Code Ann. § 15-1-49 (1972), providing the six-year "catch-all" provision for actions not otherwise provided for. As previously noted, plaintiffs' action would be untimely under either. Although some authority supports application of the six-year statute, See Hyde Construction Co., Inc. v. Koehring Company, supra. 387 F Supp 702 at 712 (applying the six-year statute to an abuse of provess action), the greater weight of authority is in favor of the one-year statute. See Dennis v. Travelers Insurance Co., 234 So 2d 624,626

(Miss. 1970) (abuse of criminal process held to come within definition of "menace" in one-year statute); Rigby v. Roadway Exp., Inc., 680 F 2d 342, 344 (5th Cir. 1982)(one-year statute applied to wrongful discharge action against employer, although not specifically provided for); Childers v. Beaver Dam Plantation, Inc., 360 F Supp 331,333 (N.D. Miss. 1973)(one-year statute applied to action for malicious prosecution, abuse of criminal process, libel and slander); Andrews v. G A B Business Services, Inc., 443 F Supp 510, 513 (N.D. Miss. 1977)(one-year statute applied to invasion of privacy action, although not specifically provided for). In our opinion the plaintiffs' complaint was properly characterized by the district court as alleging an action governed by Mississippi's one-year intentinal tort statute.

Plaintiffs argue that the action is one for the breach of a fiduciary trust. The

complaint does not allege "the existence of a trust not cognizable by the courts at common law...," within Miss. Code Ann. § 15-1-39 (1972)[2], however, nor do the facts alleged involve the type of trust contemplated by that statute. Plaintiffs also state that the complaint charges breaches of official duties rather than an intentional tort, referring to our decisions of Morrell v. City of Picayune, 690 F 2d 469 (5th Cir. 1982) and Shaw v. McCorkel, 537 F 2d 1289 (5th Cir. 1976). Both were § 1983 actions brought against law enforcement officers for physical abuse. Relying on State v. Smith, 156 Miss. 288, 125 So. 825 (1930), we held in each case that the action was essentially one against public officers and the sureties on their bonds, and therefore held applicable the six-year "catch-all" statute governing written contracts. The facts in the instant case are far removed from those in the cited cases,

however, and plaintiffs have not referred us to any case more factually aligned with the case at bar. We decline to hold that Mississippi's courts would apply the six-year statute to the facts of this case based on its decision in Smith, supra.

Plaintiffs further argue that the action is in the alternative one to recover land, within Mississippi's ten-year statutes, Miss. Code Ann. §§ 15-1-7 and 15-1-9 (1972),[3] and was therefore timely filed. Although the ten-year period for the recovery of land has been applied in two actions in Mississippi to set aside conveyances allegedly procured by fraud, the Mississippi courts have not decided the precise issue raised, i.e., whether such an action is governed by the statute relating to actions for fraud or the statute relating to actions to recover land. See Ayers v. Davidson, 285 F 2d 137 (5th Cir. 1960); Aultman v. Kelly, 109 So 2d 344 (Miss. 1959). This issue was the

subject of an Annotation in 118 A.L.R. 196 (1939), which concluded that the majority of jurisdictions deciding the issue have held that "a suit brought by one not in possession of land to obtain a decree setting aside a deed thereof as having been procured by fraud is one for relief on the ground of fraud, rather than an action for the recovery of real property." Annot., 118 A.L.R. 196,200(1939). Furthermore, the complaint seeks compensatory and punitive damages, inconsistent with an action to recover land, and is directed against ten defendants, only one of which holds title to the property. For these reasons, we are of the opinion that the plaintiffs' alternative claim is, at best, governed by the six-year statute and therefore untimely filed.

II.

Having determined the applicable limitations period, we must next determine whether

the present action is barred. It is undisputed that the action in question was not filed until nearly 7 years after the date of the conveyance to Yazoo County. Plaintiffs argue, however, that the running of the statute was tolled by the defendants' fraudulent concealment. Mississippi's fraudulent concealment statute, Miss. Code Ann. § 15-1-67 (1972) provides:

> "If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered."

Plaintiffs' allegations of fraudulent concealment are directed primarily at defendants Barbour and Neely. Although plaintiffs mention various facts which they allege were concealed from their knowledge by these defendants, in the words of the statute it is the concealment of the cause of action that acts to toll the running of the limita-

tions period, rather than the failure to appraise the plaintiff of individual items of information not material to the cause of action. Plaintiffs' primary allegation in this regard is that Barbour and Neeley failed to disclose Barbour's official association with the YIDC, a fact plaintiffs claim not to have learned until January 25, 1979, approximately three weeks prior to their filing the lawsuit.

The uncontroverted summary judgment evidence, however, taken from plaintiff Suthoff's own deposition testimony, reflects that Barbour's name was mentioned as a member of the YIDC Executive Committee in a November 10, 1971, article concerning the proposed sewage disposal plant in the People's Press, a Yazoo City newspaper; further, that Suthoff read the article shortly after it was printed and underlined Barbour's name where it appeared in the article. Plaintiffs have not alleged that

Barbour or Neely actively concealed the fact of Barbour's association with the YIDC. While the attorney-client relationship is one of special trust and confidence, imposing on the attorney a duty to disclose any interest that may adversely effect his ability to represent the client, it does not follow that a breach of that duty necessarily results in fraudulent concealment within the meaning of the tolling statute. Further, plaintiffs have not complained of any action taken by any defendant subsequent to the date of the conveyance which is alleged to have concealed the existing cause of action. We do not find that the plaintiffs have raised a fact issue of fraudulent concealment within Miss. Code Ann. § 15-1-67 (1972).

Plaintiffs next assert that the district court erred by looking to Mississippi law in determining the date the plaintiffs' cause of action accrued, incorrectly find-

ing that date to be February 22, 1972, the date of the conveyance in question. Under federal law, a cuase of action under § 1983 accrues "when [the] plaintiff knows or has reason to know of the injury which is the basis of the action." Cox v. Stanton, 529 F 2d 47 (4th Cir. 1975); accord., Lavellee v. Listi, 611 F 2d 1129, 1131 (5th Cir. 1980). In our opinion the district court properly found that to be February 22, 1972. The alleged injury occurred on that date and Mrs. Suthoff's deposition testimony clearly indicates that at that time she was convinced the condemnation action was a pretense and that attorneys Barbour and Neely were "tricking" the women. (Addendum to Breif of Appellees, pp. 14-22).[4] Mrs. Suthoff had also expressed these beliefs to other counsel prior to the date of the sale. Id. The record also reflects that plaintiffs had complained to the Mississippi State Bar about these matters in 1975, and

filed a professional malpractice action against Barbour and Neely in February, 1978. Id.

Plaintiffs also argue that because of the attorney-client relationship existing between themselves and Barbour and Neely, defendants are estopped to plead limitations as a defense to this action. Plaintiffs have cited no Mississippi authority in support of this contention, nor has our research revealed the same. The law of Mississippi appears to be that, in the absence of fraudulent concealment, the statute of limitations will act to bar an untimely action by the client against his or her attorney. See Hudson v. Kimbrough, 20 So 885 (Miss. 1896).

Plaintiff's final contention is that the district court erred in holding that the action as against Barbour and Neely was also barred by the doctrine of res judicata. As previously mentioned, the plaintiffs

filed a malpractice suit in the Mississippi Circuit Court against the attorneys in February, 1978. The suit was dismissed by the circuit judge, although it is unclear whether the court sustained the defendant's general demurrer or dismissed the action because of the plaintiffs' failure to appear at a docket setting. The district court in the instant action held that the dismissal was on the merits and consequently precluded the action against Barbour and Neely. Since we have held that the statute of limitations bars the action as against all defendants, however, it is unnecessary to resolve this issue.

AFFIRMED.

1. Miss. Code Ann. § 15-1-49(1972), provides:

> All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after."

2. Miss. Code Ann. § 15-1-39 provides, in pertinent part:

> Bills for relief, in case of the existence of a trust not cognizable by the courts of common law and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue and not after..."

3. Miss. Code Ann. § 15-1-7 provides, in pertinent part:

> A person may not make an entry or commence an action to recover land except within ten years next after the time at which the right to make the entry or to bring the action shall have first accrued..."

§ 15-1-9 provides:

> A person claiming land in equity may not bring suit to recover the same except within the period during which, by virtue of section 15-1-7, he might have made an entry or brought an action to recover the same, if he had been entitled at law to such an estate, interest, or right in or to the same as he shall claim therein in equity.

However, in every case of a concealed fraud, the right of any person to bring suit in equity for the recovery of land, of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which the fraud shall, or, with reasonable diligence might, have been first known or discovered.

4. Excerpts from the May 4-5, 1982, deposition of plaintiff Suthoff are reproduced in the Addendum to the Brief of Appellees Yazoo County, YIDC, and the Port Commission. While the Court was not provided a copy of this deposition, appellants have not objected to the accuracy or the use of the deposition excerpts by counsel.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JONEZ P. SUTHOFF, ET AL. PLAINTIFFS

VS. CIVIL ACTION NO. J79-0078(N)

YAZOO COUNTY INDUSTRIAL DEVELOPMENT CORPORATION, ET AL. DEFENDANTS

OPINION OF THE COURT

The Complaint in this case cites 42 U.S.C. § 1983 as the basis for invoking federal court jurisdiction under 28 U.S.C. § 1331 and 1343 alleging that the several defendants unlawfully conspired to deprive the plaintiffs of their lands in Yazoo County, Mississippi, without adequate compensation.

All defendants have filed pleas that the action is time barred under the Mississippi one year and six year statute of limitations citing § 15-1-35 and § 15-1-49, Miss. Code Ann. (1972), which is the basis for a

motion for summary jdugment in which all defendants join and which is now before the Court for decision.

Additionally, two of the defendants, Barbour and Neely, the attorneys who represented the plaintiffs in the defense, negotiations and sale, filed a plea of res judicata and have brought on a motion for summary judgment on the ground that this action is barred by the doctrine of res judicata by a prior judgment in state court.

FINDINGS OF FACT

Based upon the pleadings and upon the depositions and upon the affidavits filed, incluidng relevant exhibits, the Court finds as facts:

A. LIMITATIONS ISSUE

There exists no genuine issue as to any material fact and defendants are entitled to summary judgment as a matter of law.

This action is one based upon an intentional tort, for which there is an ade-

quate remedy at common law.

The alleged cause of action accrued in February of the year 1972 when the plaintiffs executed their Warranty Deed dated February 18, 1972, conveying the land in question to Yazoo County, Mississippi, and received from the grantee the sum of $100,830.00.

On their depositions, the plaintiffs testified to an awareness in 1971 and in 1972 of the alleged wrongs against them and during this period even attempted unsuccessfully to employ another attorney in the person of one John Poole. The Court concludes that plaintiffs either knew the facts underlying their present claims or should have known of facts to be on notice but nevertheless delayed the filing of this action for more than six years thereafter.

There was no concealment or concealed fraud by any of the defendants and the running of the statutes of limitations was not tolled on the facts in this case.

The plaintiffs have retained the money paid to them by Yazoo County in exchange for their deed. Yazoo County took possession of the land deeded to it and valuable improvements have been made on the property.

B. RES JUDICATA ISSUE

There exists no genuine issue as to any material fact and defendants are entitled to summary judgment as a matter of law.

In February, 1978, the same three plaintiffs filed their declaration in an action, No. 24,693, in the Circuit Court of the First Judicial District of Hinds County, Mississippi, naming Barbour and Neely as defendants. It was alleged, among other things, that Barbour and Neely had not adequately represented the plaintiffs in the land transaction and "that Barbour and Neely had failed and neglected to remain loyal and vigilant to plaintiffs' interests", thereby violating their employement contract and agreement to do so. The suit

sought to recover damages from these two defendants.

The defendants filed a joint general demurrer asking that the case be dismissed and when the case came on for trial, renewed their request for dismissal orally, and the Court entered its judgment of dismissal on October 9, 1978. That judgment became final under Mississippi law and was never appealed, set aside or vacated.

CONCLUSIONS OF LAW

The court announces its conslusions of law as follows:

A. LIMITATIONS ISSUE

Since this action is one based on an intentional tort, the Mississippi one (1) year statute of limitations is applicable and the action is barred as provided in § 15-1-35, Miss. Code Ann. (1972). The Court agrees with the decision in Childres v. Beaver Dam Plantation, 360 F Supp 331 (N.D. Miss. 1972), holding that the one

(1) year statute applies under Mississippi law to intentional torts.

Even if mistaken as to the applicability of the one (1) year statute, then the Mississippi six (6) year statute of limitations is applicable as provided in § 15-1-49, Miss. Code Ann. (1972).

As to the plaintiffs' contention that these time statutes were tolled by reason of concealed fraud, the finding of the Court is that the plaintiffs knew or should have known of the existence of facts sufficient to put them on notice in the years 1971-1972 and the six (6) year statute has run and has barred their cause of action.

The Court finds persuasive Dunn v. Dent, 169 Miss. 574, 153 So 798 (1934), applying the six (6) year statute, along with Childres v. Beaver Dam Plantation, supra, applying the one (1) year statute of limitations.

The Court finds inapplicable the ten (10) year statute dealing with bills for

relief, (§ 15-1-39). This is not the type of action contemplated by that statute, because in this case, there is an adequate remedy at common law. (§ 15-1-39).

B. RES JUDICATA ISSUE

The essential elements for the prior state court decision to constitute res judicata are all present. The allegations in the state court decision went beyond negligence and smack of the same allegation being made here.

The Court finds persuasive, Pray v. Hewitt, 254 Miss. 20, 179 So 2d 843, 844 (1965). The judgment is conclusive not only on the questions actually contested and determined, but concludes all matters which could be litigated therein. Pray v. Hewitt, supra; Schwartz Brothers & Co. v. Stafford, 166 Miss. 397, 148 So 2d 794 (1933); Golden v. Golden, 246 Miss 562, 151 So 2d 598 (1963).

The granting of a general demurrer does constitute judgment on the merits. The

order of dismissal is with prejudice in any event. Ross v. Milner, 194 Miss 497, 12 So 2d 917 (1943); Strain v. Gayden, 197 Miss. 353, 365, 20 So 2d 697, 700(1945); Balfour v. Wells, 183 707, 183 So 392 (1938); Williams v. Patterson, 203 Miss. 865, 34 So 2d 366 (1948); Neill v. Wells, 164 Miss. 372, 145 So 341 (1933); Straw v. Illinois Central Railroad Co., 73 Miss 446 18 So 847 (1895); Shaw v. Laurel Oil & Fertilizer Co., 92 Miss. 340, 45 So 878 (1908); Delta Construction Co. of Jackson v. City of Jackson, 198 So 2d 592, 605 (1967).

The judgment constitutes a bar against these plaintiffs bringing the present case agasint the same two defendants in federal court.

CONCLUSION

The motion of all defendants for summary judgment based upon the plea of time limitations is sustained and the motion of the two defendants, Neely and Barbour, based

on the plea of res judicata is sustained and judgment may be entered accordingly in favor of the defendants, Yazoo County Industrial Development Corporation; Yazoo County, Mississippi, Yazoo County Port Commission; Yazoo City, Mississippi; Yazoo Public Service Commission; William H. Barbour; Tom Campbell, Jr.; E.A. Smith; William T. Neely and Joel Stevenson, providing that the plaintiffs, Jonez P. Suthoff, Frances P. Miller and Inez W. Philibert shall have and recover nothing by their action and that the Complaint be dismissed in favor of all of said defendants jointly and separately and with prejudice to the plaintiffs.

SO ORDERED on this the 2nd day of February, 1983.

s/ Walter L. Nixon, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX III

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JONEZ P. SUTHOFF,
FRANCES P. MILLER
AND INEZ W. PHILIBERT — PLAINTIFFS

V. — CIVIL ACTION NO. J79-0078(N)

YAZOO COUNTY INDUSTRIAL DEVELOPMENT CORPORATION: YAZOO COUNTY, MISSISSIPPI; YAZOO COUNTY PORT COMMISSION; YAZOO CITY, MISSISSIPPI; WILLIAM H. BARBOUR; TOM CAMPBELL, JR.,; E.A. SMITH; WILLIAM T. NEELY AND JOEL STEVENSON — DEFENDANTS

FINAL JUDGMENT

This cause came on to be heard on the motion of defendants for summary judgment on the plea of each defendant that the action is time barred by relevant statutes of limitations and the Court having heard the motion on the pleadings and on the

depositions and on the affidavits filed, including relevant exhibits, and having heard the arguments of counsel and finding that there is no genuine issue of fact and that all defendants are entitled to judgment as a matter of law and finding that the motion is well taken and should be sustained;

IT IS ORDERED AND ADJUDGED that the plaintiffs, Jonez P. Suthoff, Frances P. Miller and Inez W. Philibert do have and recover nothing by their action in this cause and that their Complaint be and it is hereby finally dismissed with prejudice to the plaintiffs and in favor of the defendants, Yazoo County Industrial Development Corporation; Yazoo County, Mississippi; Yazoo County Port Commission; Yazoo City, Mississippi; Yazoo Public Service Commission; William H. Barbour; Tom Campbell, Jr.; E.A. Smith; William T. Neely and Joel Stevenson. The costs will be assessed against the plaintiffs.

SO ORDERED on this the 2nd day of February, 1983.

Walter L. Nixon, Jr.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM ONLY:

Dixon L. Pyles
Attorney For Plaintiffs

Vardaman S. Dunn
Attorney For Defendants

APPENDIX IV

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JONEZ P. SUTHOFF, FRANCES P. MILLER AND INEZ W. PHILIBERT — PLAINTIFFS

VS. CIVIL ACTION NO. J79-0078(N)

YAZOO COUNTY INDUSTRIAL DEVELOPMENT CORPORATION; YAZOO COUNTY, MISSISSIPPI; YAZOO COUNTY PORT COMMISSION; YAZOO CITY, MISSISSIPPI; YAZOO PUBLIC SERVICE COMMISSION; WILLIAM H. BARBOUR; TOM CAMPBELL, JR.; E.A. SMITH; WILLIAM T. NEELY AND JOEL STEVENSON — DEFENDANTS

FINAL JUDGMENT

This cause came on to be heard on the motion of defendants, William H. Barbour and William T. Neely on the plea of each of these defendants that the action is barred by the doctrine of res judicata by a prior judgment entered in Cause No. 24,693 in the

Circuit Court of the First Judicial Distirct of Hinds County, Mississippi, and the Court having examined the state court proceedings and judgment and having heard the arguments of counsel and finding that there is no genuine issue of fact and that these defendants are entitled to judgment as a matter of law on their plea of res judicata and that the motion for summary judgment is well taken and should be sustained;

IT IS ORDERED that plaintiffs, Jonez P. Suthoff, Frances P. Miller and Inez W. Philibert do have and recover nothing by their action in this cause against the defendants, William H. Barbour and William T. Neely and that their Complaint as to these defendants is hereby finally dismissed with prejudice to the plaintiffs and in favor of said defendants. The costs will be assessed against the plaintiffs.

SO ORDERED on this the 2nd day of February, 1983.

Walter L. Nixon , Jr.
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM ONLY:

Dixon L. Pyles
Attorney For Plaintiffs

Vardaman S. Dunn
Attorney For Defendants

APPENDIX V

CONSTITUTION OF THE UNITED STATES
FIFTH AMENDMENT

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or propery, without due process of law; nor shall private property be taken for public use, without jsut compensation.

APPENDIX VI

CONSTITUTION OF THE UNITED STATES
FOURTEENTH AMENDMENT

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX VII

42 U.S.C., § 1983

§ 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usuage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the

District of Columbia.

APPENDIX VIII

42 U.S.C., § 4651

§ 4651. UNIFORM POLICY ON REAL PROPERTY ACQUISITION PRACTICES

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices, heads of Federal agencies shall, to the greatest extent practicable, be guided by the following policies:

(1) The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(2) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to

accompany the appraiser during his inspection of the property.

(3) Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the

property. The head of the Federal agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

(4) No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court in accordance with section 258a of Title 40, for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.

(5) The construction of development of a public improvement shall be so scheduled

that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling as required by subchapter II of this chapter will be available), or to move his business or farm operation, without at least ninety days' written notice from the head of the Federal agency concerned, of the date by which such move is required.

(6) If the head of a Federal agency permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by the Government on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

(7) In no enent shall the head of a Federal agency either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in

court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.

(8) If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(9) If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire the entire property.

APPENDIX IX

42 U.S.C., § 4655

§ 4655. REQUIREMENTS FOR UNIFORM LAND ACQUISITION POLICIES: PAYMENTS OF EXPENSES INCIDENTAL TO TRANSFER OF REAL PROPERTY TO STATE; PAYMENT OF LITIGATION EXPENSES IN CERTAIN CASES

Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, a State agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after January 2, 1971, unless he receives satisfactory assurances from such State agency that--

(1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land

acquisition policies in section 4651 of this title and the provisions of section 4652 of this title, and

(2) property owners will be paid or reimbursed for necessary expenses as specified in sections 4653 and 4654 of this title.

APPENDIX X

MISSISSIPPI CODE 1972 ANNOTATED

§ 15-1-9. LIMITATIONS APPLICABLE TO SUITS IN EQUITY TO RECOVER LAND.

A person claiming land in equity may not bring suit to recover the same except within the period during which, by virtue of section 15-1-7, he might have made an entry or brought an action to recover the same, if he had been entitled at law to such an estate, interest, or right in or to the same as he shall claim therein in equity. However, in every case of a concealed fraud, the right of any person to bring suit in equity for the recovery of land, of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which the fraud shall, or, with reasonalbe diligence might, have been first known or discovered.

APPENDIX XI

MISSISSIPPI CODE 1972 ANNOTATED

§ 15-1-35. LIMITATIONS APPLICABLE TO ACTIONS FOR CERTAIN TORTS.

All actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, and for libels, shall be commenced within one year next after the cause of such action accrued, and not after.

APPENDIX XII

MISSISSIPPI CODE 1972 ANNOTATED

§ 15-1-39. LIMITATIONS APPLICABLE TO ACTIONS INVOLVING CERTAIN TRUSTS.

Bills for relief, in case of the existence of a trust not coznizable by the courts of common law and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue and not after, saving, however, to all persons under disability of infancy or unsoundness of mind, the like period of time after such disability shall be removed. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one years.

APPENDIX XIII

MISSISSIPPI CODE 1972 ANNOTATED

§ 15-1-49. LIMITATIONS APPLICABLE TO ACTIONS NOT OTHERWISE SPECIFICALLY PROVIDED FOR.

All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

APPENDIX XIV

MISSISSIPPI CODE 1972 ANNOTATED

§ 15-1-67. EFFECT OF FRAUDULENT CONCEALMENT OF CAUSE OF ACTION.

If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be or with reasonable diligence might have been, first known or discovered.

APPENDIX XV

MISSISSIPPI CODE 1972 ANNOTATED

§ 15-1-69. COMMENCEMENT OF NEW ACTION SUBSEQUENT TO ABATEMENT OR DEFEAT OF ORIGINAL ACTION.

If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein, and his executor or administrator may, in case of the plaintiff's death, commence such new action, within the said one year.

APPENDIX XVI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

ROY HARRIS — PLAINTIFF

V. — CIVIL ACTION NO. S81-0553(R)

COMBINED INSURANCE COMPANY OF NORTH AMERICA — DEFENDANT

MEMORANDUM OPINION

Presently before this Court for consideration is the defendant Combined Insurance Company of North America's (Combined) motion for partial summary judgment. The plaintiff (Harris) alleged that Combined breached its insurance contract by ceasing the payment of monthly disability benefits to the plaintiff. Included in the suit was a claim for punitive damages.

The alleged breach occured on or about February 28, 1980. This suit was filed in October, 1981. Therefore, Combined contends,

the claim for punitive damages is barred by the Mississippi statute of Limitations for intentional torts[1] and by a limitations statute designed for suits for penalty[2]. Both of these statutes provide for a one year limitatios period. Combined's argument is that in actions for tortious breach of an insurance contract, punitive damages are not recoverable unless the insurer's breach of contract is attended by "an intentional wrong, insult, or abuse, or such gross negligence as amounts to an independent tort," Gulf Guaranty Life Ins. Co. v. Kelley, 392 So 2d 519 (Miss. 1980). Therefore, the one year statute of limitations would apply and the plaintiff's punitive damage claim is barred. In response the plaintiff urges that Miss. Code Ann. § 15-1-35 (1983) contains an inclusive listing of intentional torts which does not include tortious breach of contract. Therefore the six year statute would apply to an action for

tortious breach of an insurance contract in which punitive damages are requested.

Combined additionally relies on Miss. Code Ann. § 15-1-33 (1972), which allows a suit on a penalty within one year. Reasoning that punitve damages are "penalties," Combined urges that the statute should bar the action.

It is the opinion of this Court that neither statute is applicable in the instant action. The theory which results in reliance on § 15-1-35 is based on the standard for an award of punitive damages. In Mississippi, this standard has been most recently enunciated as follows: "Punitive damages are not recoverable for the breach of a contract unless such breach is attended by intentional wrong, insult, abuse of such gross negligence as to consist of an independent tort." Consolidated American Life Insurance Co. v. Toche, 410 So 2d 1303,1304 (Miss. 1982); Standard Life Insurance Co. of

Indiana v. Veal, 354 So 2d 239, 247 (Miss. 1977); Progressive Casualty Insurance Co. v. Keyes, 317 So 2d 396 (Miss. 1975). In earlier cases, the language was substantially the same; the court merely used the word "tort" in lieu of "independnet tort". D.L. Fair Lumber Co. v. Weems, 196 Miss. 201, 16 So 770, 773 (1944); American Railway Express Co. v. Bailey, 142 Miss. 622, 107 So 761, 763 (1926). In Seals v. St. Regis Paper Co., 236 So 2d 288,392 (Miss. 1970), the Mississippi Supreme Court stated that "]p]unitive damages may be recovered for a willful and intentional wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong." The court has also said that there must be "some element of aggression or some coloring of insult, malice or gross negligence, evincing ruthless disregard for the rights of others to be appropriate. Fowler Butane Gas Co. v. Varner, 244 Miss 130, 141 So 2d 226,

33 (1962). This standard has been applied by the federal courts. Vogel v. American Warranty Home Service Corp., 695 F 2d 877, 883 (5th Cir. 1983); Felts v. National Account Systems Association, Inc., 469 F Supp 54,69 (N.D. Miss. 1978); Michael v. National Security Fire and Casualty Co., 458 F Supp 128, 131 (N.D. Miss. 1978). In one case, Andrews v. GAB Business Services, Inc., 443 F Supp 510, 516(N.D. Miss. 1977), the Mississippi Supreme Court was quoted as having held that punitives were not recoverable unless "the breach [was] attended by some intentional wrong, insult, abuse or gross negligence, which amounts to an intentional tort." (emphasis added). However, this is not what Mississippi cases have held. The language has consistently been "independent tort," which embraces all torts, not simply the intentional ones. Combined has likewise equated "independent tort" with "intentional tort." However, the

Court is of the opinion that the term "independent tort" embraces all torts, not merely intentional ones. Application of § 15-1-35 to a request for punitive damages would be overly restrictive and would result in misapplication of clear legislative intent.

This Court is not unaware of the opinion in Short v. Metropolitan Life Insurance Co., Civil Action S82-0012(N) (S.D. Miss. Sept. 2, 1982). While the court addressed this issue and stated that the one year statute of limitations would be applicable to the plaintiff's claim for punitive damages, this assertion was merely dictum; it was not necessary to "reach a decision on the statute of limitations issue to reach a final disposition of this cause." Short, slip op. at 6.

. With respect to § 15-1-33 the state court held that "this section reveals by its plain terms that it applies only to suits for any

penalty or forfeiture based on a penal statute..." Latham v. United States Fidelity & Guaranty Co., 267 So 2d 895, 897 (Miss. 1972). The instant action is not based on a "penal statute." Therefore, it is this Court's opinion that the one year limitation found in the section has no application here.

On the basis of the foregoing, the defendant's motion should be, and hereby is denied.

An order in accordance with the opinion of this Court shall be provided as set forth in the Local Rules.

This the 27th day of February, 1984.

Dan M. Russell, Jr.

UNITED STATES DISTRICT JUDGE

NOTES

1. MISS. CODE ANN. § 15-1-35(1983) provides:

> Limitations Applicable to Actions For Certain Torts.
>
> All actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, for failure to employ, and for libels, shall be commenced within one (1) year next after the cause of such action accrued, and not after.

2. MISS. CODE ANN. § 15-1-33(1972) provides:

> Limitations Applicable To Actions And Suits For Penalty For Forfeiture.
>
> All actions and suits for any penalty for forfeiture on any penal statute, brought by any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense was committed, and not after.

APPENDIX XVII

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

LONNIE LEE CUEVAS — PLAINTIFF

VS. — CIVIL ACTION NO. S82-0589(R)

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY — DEFENDANT

MEMORANDUM OPINION

Pending before the court are the motions of Nationwide Mutual Fire Insurance Company (Nationwide) for summary jdugment on grounds of misrepresentations made by the insured and for partial summary judgment on the issue of punitive damages.

Nationwise issued to the plaintiff a homeowners policy covering his dwelling and its contents. Approximately one month after the issuance of the policy, the plaintiff's home was destroyed by fire. Prior to issuance of the policy, both the plaintiff and his wife were allegedly asked if either had

experienced a loss within the previous five years to which both of them responded negatively. Additionally, the defendant inquired into whether the plaintiff's home would contain central air and heat to which the plaintiff responded affirmatively. After the plaintiff's fire loss, the defendant discovered that the plaintiff had experienced a total of three fire losses on the same slab and received insurance proceeds on two of the three losses. In addition, the defendant learned that the plaintiff's home contained space heaters as opposed to central air and heat.

The defendant asserts that these misrepresentations are material and are sufficient to void the policy. Don Petriskie, defendant's underwriting supervisor, testified by affidavit that Nationwide would not have issued coverage if it had been informed of the prior fire losses and the absence of central air and heat.

It has been held by Mississippi courts that where the insured induces the insurance company to accept his application and issue his policy by way of fraudulent misrepresentation, the policy may be declared void by the company. See Tolar v. Bankers Trust Savings and Loan Assn., 363 So 2d 732(Miss. 1978). However, before the policy may be voided, the insurance company must show not only that misrepresentations were made, but also that they were material and that they were relied upon by the company. See Home Ins. Co. v. Olmstead, 355 So 2d 310 (Miss. 1978); Southeastern Fidelity Ins. Co. v. Gann, 340 So 2d 429 (Miss. 1976); Reserve Life Ins. Co. v. Brunson, 172 So 2d 571 (Miss. 1965).

In his sworn statement, the plaintiff represents that he does not recall having been asked about previous fire losses. The plaintiff's wife who completed the application admits that she was asked about prior

losses but she knew of none; the plaintiff in his deposition states that he never told his wife of the prior fires.

On grounds that there exist issues of material fact as to whether misrepresentations were made, their materiality, and the defendant's reliance upon them, the Court denies the defendant's motion for summary judgment.

Alternatively, the defendant asks that partial summary judgment be granted dismissing the plaintiff's claim for punitive damages. The defendant contends that it found sufficient evidence of an incendiary origin, motive, and opportunity to justify its denial of the plaintiff's claim. After reviewing the evidence submitted by the defendant, the Court concludes that the motion for partial summary must be denied at this time. The defendant may, of course, raise this issue at trial. The Court reminds the defendant that a punitive damage

instruction will not be granted unless sufficient evidence has been presented.

The defendant further argues that partial summary judgment is proper on the issue of punitive damages as they are barred by Miss. Code Ann. § 15-1-35 (1983) which is the one year statute of limitations governing intentional torts. The defendant's argument is that in actions for tortious breach of an insurance contract, punitive damages are not recoverable unless the insurer's breach of contract is attended by "an intentional wrong, insult, abuse, or such gross negligence as amounts to an independent tort." Gulf Guaranty Life Ins. Co. v. Kelley, 389 So 2d 920 (Miss. 1980). Therefore, the one year statute of limitations governing intentional torts would apply and since the fire loss in the instant case occurred on March 31, 1980, and suit was filed on August 18, 1982, the plaintiff's punitive damage claim is time barred.

In response, the plaintiff contends that § 15-1-35 contains an inclusive listing of intentional torts subject to the one year statute of limitations and that Miss. Code Ann. § 15-1-49, the catch-all six year statute of limitations, applies to an action for the commission of tortious breach of an insurance contract in which punitive damages are requested.

The theory which results in reliance upon Miss. Code Ann. § 15-1-35 (1982) is the standard for an award of punitive damages. This standard has been most recently enunciated as follows: "[p]unitive damages are not recoverable for the breach of a contract unless such breach is attended by intentional wrong, insult, abuse, or such gross negligence as to consist of an independent tort". Consolidated American Life Ins. Co. v. Toche, 410 So 2d 1303, 1304 (Miss. 1982); Standard Life Ins. Co. v. Veal, 354 So 2d 239,247(Miss. 1977); Progressive Casualty

Ins. Co. v. Keyes, 317 So 2d 396 (Miss. 1975). In earlier cases the language was substantially the same; the court merely used the word "tort" in lieu of "independent tort." D.L. Fair Lumber Co. v. Weems, 16 So 2d 770, 773 (Miss. 1944); American Railway Express Co. v. Bailey, 107 So 761, 763 (Miss. 1926). In arguing for the application of § 15-1-35, the defendant equates "independent tort" with "intentional tort." However, the Court is of the opinion that the term "independent tort" embraces all torts, not merely intentional ones. Application of § 15-1-35 to a plaintiff's request for punitive damages where the insurer's tortious breach of an insurance contract was attended by only gross negligence would be overly restrictive and would result in misapplication of a clear legislative intent.

The Court is not unaware of the case of Short v. Metropolitan Life Ins. Co.,

No. S82-0012(N) (S.D. Miss. Sept. 2, 1982). While the court addressed this issue and stated that the one year statute of limitations would be applicable to the plaintiff's claim for punitive damages, this assertion was merely dictum; it was not necessary to "reach a decision on the statute of limitations issue to reach a final disposition of this cause." Short v. Metropolitan Life Ins. Co., slip op. at 6.

Thus, it is the opinion of this Court that the one year limitation found in § 15-1-35 had no application to a plaintiff's action for tortious breach of an insurance contract in which punitive damages are requested.[1]

The defendant's motion for summary judgment or in the alternative for partial summary judgment is hereby denied. An order in accordance with the opinion of this Court shall be submitted in accordance with the Local Rules. This the 25th day of February, 1984.

Dan M. Russell, Jr.

UNITED STATES DISTRICT JUDGE

NOTE

1. The defendant, by citing the Court to Vidrine v. Enger, No. S80-0364(C) (S.D. Miss. Sept. 8, 1983), argues that the plaintiff's claim for punitive damages is barred by Miss. Code Ann. § 15-1-33(1972) which provides that "[a]ll actions and suits for any penalty or forfeiture on any penal statute, brought by any person to whom the penalty or forfeitire is given, in whole or in part, shall be commenced within one year next after the offense was committed..." The defendant argues that since punitive damages are in the nature of a punishment, Fowler Butane Gas Co. v. Varner, 141 So 2d 226 (Miss. 1962), then by virtue of § 15-1-33 the plaintiff's claim for punitive damages is barred.

However, "this section reveals by its plain terms that it applies only to suits for any penalty or forfeiture based on a penal statute..." Latham v. United States Fidelity & Guaranty Co., 267 So 2d 895, 897 (Miss. 1972). The instant action is not based upon any such penal statute. Thus, § 15-1-33 has no application here.

APPENDIX XVIII

SIBYL HARRISON, Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 81-2501.

United States Court of Appeals,

Fifth Circuit.

July 5, 1983.

Woman appealed from dismissal by the United States District Court for the Eastern District of Texas, William Wayne Justice, Chief Judge, of her suit under federal Tort Claims Act as barred by statute of limitations. The Court of Appeals, Politz, Circuit Judge, held that statute of limitations was tolled during time that critical medical records were purposely suppressed and kept from woman.

Reversed and remanded.

1. Limitation of Actions - 95(1)

Two-year statute of limitations in Federal Tort Claims Act for malpractice does not begin to run until plaintiff has knowledge of factual predicate for malpractice, that is, fact of his injury and its cause. 28 U.S.C.A. §2401(b).

2. Limitation of Actions - 95(1)

Plaintiff in medical malpractice case need not have knowledge of fault in legal sense for statute of limitations to run, but she must have knowledge of facts that would lead reasonable person to conclude that there was causal connection between treatment and injury or, to seek professional advice, and, with that advice, to conclude that there was causal connection between treatment and injury.

3. Limitations of Actions - 95(1), 104(1)

Where prior to time woman received copies of her medical records, myriad medical and legal experts could not express

reasoned opinion that cause of her impairment was error in medical procedures conducted at Air Force base hospital, and critical records were purposely suppressed for nearly a decade, two-year statute of limitations in Federal Tort Claims Act for bringing medical malpractice action was tolled. 28 U.S.C.A. §2401(b).

4. Limitation of Actions - 195(5)

When plaintiff shows that defendant has actively worked to conceal information about plaintiff's injury or its cause, defendant bears heavier than normal burden in showing that plaintiff possessed level of knowledge required to commence accrual of period of limitations.

5. Fraud - 16

Silence may constitute fraudulent concealment in instance of fiduciary relationship such as that which would exist between doctor and patient.

Appeal from the United States District Court for the Eastern District of Texas.

Before INGRAHAM, REAVLEY and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

Sibyl Harrison's headaches began in 1962. They continue to this day--the pain amplified by the dismissal of her suit under the Federal Tort Claims Act as barred by the statute of limitations.

As the wife of a retired airman, Harrison sought medical treatment in December 1966 at Wilford Hall Hospital, Lackland Air Force Base, San Antonio. Doctors Benjamin Allen and Richard Ashby, Air Force mecical officers, suspecting a brain tumor, decided to perform a ventriculogram and pneumoencephalogram. These very painful procedures involve the introduction of air into the brain and spinal cord, respectively, as a part of x-ray examination of the brain.

During the examination Harrison was placed in a special chair which could be positioned to permit the doctors to control the movement of the air bubble. Typically, the back of the chair is dropped, the patient is placed first in a supine position and is then rotated upside down. When the x-rays from the ventriculogram proved inconclusive, the doctors injected an air bubble into Harrison's spine. The needle used in the ventriculogram was left in Harrison's skull during the subsequent procedure.

During the course of the tests and while the chair was being moved, Harrison lost consciousness. Upon reviving, she noted a slight numbness in her arm, a condition the doctors described as a normal reaction to the tests. Other patients informed Harrison that they, too, had experienced transient numbness. As anticipated, Harrison's numbness soon disappeared.

In the ensuing years Harrison suffered from the left frontal headaches which had first caused her to seek help at Wilford Hall. In addition, she experienced speech impairment, loss of memory and a burning sensation on the left side of her face. She consulted several doctors; none could help. By 1968 she was under the care of Dr. Thomas Nash, a private physician. He could not identify the cause of Harrison's difficulties and referred her to St. Paul Hospital for extensive testing. In a letter to a colleague, Nash wrote: "I cannot make a definitive diagnosis .... It certainly is one of the most bizarre and unusual cases I have seen."

The tests conducted at St. Paul Hospital indicated a possible answer to the mystery--Harrison had an acoustic brain tumor. In June 1968, Dr. Charles Simpson surgically removed a portion of the tumor. The location of the tumor prevented complete excision

and the possibility of regrowth remained.

The abatement of Harrison's pain was short-lived. The headaches, numbness, paralysis and burning sensation returned and were increasingly painful. Her life began to disintegrate. Constant pain forced closure of her small flower shop and interfered with her efforts to care for her invalid husband. Desparate to find an explanation for her suffering, Harrison became convinced that the tumor was growing anew. She returned to Simpson every other month for two years, insisting on x-rays of the tumor. No new growth was found. Though unable to identify the source of Harrison's pain, Simpson assured her that it was not the tumor. He refused to conduct further x-ray examinations, telling her "I'm going to burn your brain up." On the basis of what he then knew of Harrison's medical condition and history, including

information received from Allen and Ashby, Simpson concluded that Harrison would never recover. He finally told her "You've bought the farm. It's yours. You're going to have it from now on."

During this period, in her desperation, Harrison grasped at a new theory for her pain--the doctors at Wilford Hall had damaged her brain. Just as she had earlier believed that the tumor was growing wildly in her head, she now came to the view that Wilford Hall was the source of her difficulty. She took this suspicion to Simpson who rejected it. Harrison sought legal counsel.

Harrison told her attorney, Leslie Echols, that she believed the doctors at Wilford Hall were responsible for her difficulties. Pressed for supporting data, Harrison could only share her speculation. Echols found no medical evidence and no rational basis for Harrison's intuitive conclusion. Indeed the evidence then avail-

able--the written opinions of the legion of doctors Harrison had consulted, suggested that the care at Wilford Hall had been the best possible. Echols declined to proceed further.

Harrison was undaunted. She tried to obtain copies of her medical records from Wilford Hall. When she ran into a stone wall, she again sought Echols' assistance. He reluctantly agreed to make another effort. In December 1973 Echols traveled to Dallas in the hope that Dr. Simpson would shed some light. When Simpson told senior attorney Echols' "Son. You're doing nothing but chasing rabbits," Echols redoubled his efforts. He paid a personal visit to Wilford Hall. The Clinical Records Librarian informed Echols that she could not then locate the records but that she would check further and contact him. She did not do so. Echols' repeated attempts to communicate with the records librarian were signally unsuccessful.

In the meantime, Simpson referred Harrison to Duke University Hospital, for help in determining the cause of her pain. The experts there were unable to define the cause of the pain, ruled out brain surgery as too risky, and expressed the opinion that the condition was permanent. Once again, Harrison was stymied. The best medical advice she could secure was of no assistance in pinpointing the cause of her difficulty.

By the end of 1974, at Simpson's suggestion, Harrison visited a psychiatrist. Simpson was of the opinion that Harrison had become addicted to the medication given for palliation of the pain and thought she might benefit from psychiatric assistance. In discussing the history of her illness with the psychiatrist, Harrison focused on a new theory: when he removed the excisable portion of the tumor, Dr. Simpson had sliced through her brain causing all of her ailments. As with the prior theories, available medical

evidence did not support Harrison's belief.

After his efforts at Wilford Hall produced nothing, not even response to his inquiries, Echols reported to Harrison and commented that she might have better luck writing to the President of the United States. Harrison wrote.

The President responded. Harrison received a letter from a Colonel, who wrote on behalf of the President to advise that her letter had been placed "in the hands of appropriate officials for their careful consideration." Harrison heard further, by letter dated July 26, 1975, from Colonel L. E. Seminare, Jr. The letter stated:

> Authorities in the Office of the Surgeon General, USAF, reviewed your inpatient records from Wilford Hall and found no evidence of mismanagement in your case .... Your records show no evidence of any difficulties being encountered during the procedure.

Echols was puzzled. From the information he had been furnished, the records were

not in Washington, D. C. The letter, however, suggested they were. Echols headed for Washington. He went to the Pentagon and spoke to a Lieutenant who told him the records were across town at the Forrestal Building. A Lt. Colonel at the Forrestal Building advised Echols that the records were at a nearby Andrews Air Force Base. A Captain there told Echols his client's records were in St. Louis. Echols returned to Paris, Texas.

In February 1976, Echols received an unexpected telephone call from a Colonel at Lackland advising that the files had been found and were being mailed immediately. Weeks passed. Echols telephoned the Colonel who stated that the records had inexplicably disappeared but vowed to track them down. Months passed.

On July 23, 1976 the records finally arrived. Echols took them to Simpson. In less than a minute the decade-old mystery

of Sibyl Harrison's enigmatic difficulties was solved: During the course of the tests at Wilford Hall the needle from the ventriculogram had plunged into the center of Sibyl Harrison's brain. Before beginning the spinal puncture Ashby and Allen had neglected to remove or secure the needle, or replace it with a safer, more flexible needle. While Harrison was being turned about, the needle was driven into her thalamus. Simpson perceived Allen's contemporaneous medical notes as "clear-cut evidence that Harrison's thalamic pain is due to the ventricular needle having been placed in the thalamus from whence developed a thalamic scar which is the cause of pain."

It is appropriate to inquire why the source of Harrison's problems eluded so many doctors. That inquiry is relevant to the issue before us today. First, the thalamus is located toward the center of the brain, away from the area in which air

would be introduced during a ventriculogram. It would be an extremely unusual occurrence to pierce the thalamus during that procedure.

Second, Simpson and all of the other doctors were told by Allen and Ashby that the tests were properly performed. Before removing Harrison's tumor in 1968 Simpson wrote Allen and Ashby, requesting the x-rays and a full account of the tests performed at Wilford Hall, Ashby and Allen did not release the x-rays; instead they assured Simpson that "the only abnormality we ever found was that the right cerebellar pontine angle failed to fill." That abnormality was totally unrelated to the thalamic injury. To suggest that the representation by Ashby and Allen was merely less than candid would be unjustifiably kind. The x-rays clearly revealed that the needle had penetrated the thalamus. Further, immediately after

receiving the x-rays Allen and Ashby discussed the damage that had been caused to the thalamus. Finally, the "work-up," which Ashby purported to be a complete summary of the tests, made no mention of the thalamic insult, despite the fact that notes taken by Allen at the time of the ventriculogram revealed the true nature of the damage: "x-rays demonstrated that tip of ventricular needle is penetrating floor of ... thalamus."

Third, Harrison was unable to provide any persuasive information that might have given a clue as to what had happened at Wilford Hall. She was not conversant with the procedure. She told of her beliefs but she could only report that the chair dropped backwards, a normal movement since the chair was designed to first lay the patient supine and then tilt the patient upside down as a means of directing the movement of the air bubble.

Fourth, Harrison's headaches predated the Wilford Hall incident and were compounded after Wilford Hall by other complications including an acoustic brain tumor, brain surgery, drug addiction, exposure to large amounts of x-rays, and a variety of emotional problems.

Fifth, the only direct evidence of a thalamic injury was contained in the x-rays done at Wilford Hall. Without those x-rays, or accurate reports based on that x-ray evidence, the doctors could do no more than speculate as to the possible source and cause of Harrison's problems. These critical x-rays were purposely suppressed for nearly a decade. They were not overlooked--they were hidden from view.

THE LAW

(1,2) The Federal Tort Claims Act prescribes a two year statute of limitations. 28 U.S.C. §2401(b). The period does not

begin to accrue until the plaintiff has "knowledge of the 'factual predicate for a malpractice claim,' i.e., 'the fact of his injury and its cause.'" Lavellee v. Listi, 611 F.2d 1129, 1131 (5th Cir.1980) (quoting United States v. Kubrick, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979). As stated by our colleagues in the Seventh Circuit: "In medical malpractice cases ... the statute of limitations does not begin to run until after the patient discovers or in the exercise of reasonable diligence should discover his injury and its cause." Stoleson v. United States, 629 F.2d 1265, 1268 (7th Cir.1980). The plaintiff need not have knowledge of fault in the legal sense for the statute to begin to run, but she must have knowledge of facts that would lead a reasonable person (a) to conclude that there was a causal connection between the treatment and injury or (b) to seek professional advice, and then, with that advice, to

conclude that there was a causal connection between the treatment and injury. The district court held that Sibyl Harrison was aware of the facts of her injury and their cause sometime before September 20, 1974. Since she did not file suit until September 20, 1976, her claim was considered barred.

In assessing the awareness required to trigger the statute of limitations, it is essential to distinguish between "knowledge" and "belief." For one to have knowledge of fact "x", three requisites must exist: (1) "x" must be true, (2) the person must believe "x" to be true, and (3) the belief must be reasonably based. A. Flew, A Dictionary of Philosophy (1979); A. Quinton, "Knowledge and Belief," Encyclopedia of Philosophy (1967). "Belief," which is a component of knowledge, requires only requisites (1) and (2)--"x" must be true and the person must believe it to be true. As

a consequence, conclusions based on dreams, intuitions, suspicion, conjecture, ESP, speculation, or faulty reasoning, even if true, are merely "belief." Absent a reasonable basis, these conclusions do not rise to the level of "knowledge."

The distinction between knowledge and mere belief has long been recognized by the courts, implicitly if not explicitly. In Tracerlab, Inc. v. Industrial Nucleonics, 313 F.2d 97, 102 (1st Cir.1963), the court observed:

> The 'personal knowledge' in Sanborn v. Gale, 162 Mass. 412, 38 N.E.2d 710 (1894) must be compared with the present case where the plaintiff did not know any facts and had only 'rumor,' 'suspicion,' 'guesses,' and 'surmises.'.... Suspicion and knowledge are poles apart on a continuum of understanding.

(3) Prior to July 1976, Harrison had only a belief. She could not know the basis for her injury. The myriad medical and legal experts could not express a reasoned

opinion that the cause of her impairment was an error in the medical procedure conducted at Wilford Hall. They could not relate causally her difficulties and Wilford Hall. It is not reasonable to suggest that before gaining access to her records Harrison possessed the requisite knowledge of the cause of her condition when doctors who knew immeasurably more than her were stymied and freely admitted their bewilderment. It would be unreasonable to hold Harrison to a higher degree of medical competence and understanding than the many medical experts she consulted.

Harrison's suspicion or belief that her problems dated from Wilford Hall was merely one of a series of explanations that she seized upon in anguish and desspersation to explain her illness. Her privately conceived notions did not become knowledge until July 1976 when she received

copies of her medical records. Only then was she in a position to know that her difficulties were caused by a slip in the procedures at Wilford Hall. See Aerojet-General Shipyards, Inc. v. O'Keeffe, 413 F.2d 793 (5th Cir.1969).

(4,5) The situation Harrison faced is exactly the type of situation referred to by Justice White in United States v. Kubrick, when he observed that "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." 444 U.S. at 122, 100 S.Ct. at 359. In such an instance, other conditions being met, the statute of limitations is tolled.[1]

REVERSED AND REMANDED.

1. Because of our disposition of this appeal we need not resolve the issue of fraudulent concealment which is inherent in the factual situation presented herein. We merely note

that limitations is an affirmative defense with the defendant generally bearing only a modest burden of proof. Typically, one merely views the date suit is filed in light of the date of the occurrence. But that simple situation does not apply when equitable considerations are urged as an offset to the limitations bar. Prather v. Neva Paperbacks, Inc., 446 F.2d 338 (5th Cir.1971). When, as here, the plaintiff shows that a defendant has actively worked to conceal information about plaintiff's injury or its cause, the defendant bears a heavier burden in showing that the plaintiff possessed the level of knowledge required to commence accrual of the period of limitations. Compare, Barrett v. United States, 689 F.2d 324 (2d Cir.1982); Fitzgerald v. Seamans, 553 F.2d 220 (D.C.Cir.1977). In addition to the active concealment by Allen and Ashby, there is the additional dimension of concealment following from their failure to advise Harrison of the injury. Silence may constitute fraudulent concealment in the instance of a fiduciary relationship such as that which exists between doctor and patient. Nardone v. Reynolds, 538 F.2d 1131 (5th Cir.1976); Peck v. United States, 470 F. Supp. 1003 (S.D.N.Y.1979).

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No. 83-1650

In the Supreme Court of the United States

October Term, 1983

JONEZ P. SUTHOFF, FRANCES P. MILLER AND INEZ W. PHILIBERT,
Petitioners,

vs.

YAZOO COUNTY INDUSTRIAL DEVELOPMENT CORPORATION; YAZOO COUNTY, MISSISSIPPI; YAZOO COUNTY PORT COMMISSION; YAZOO CITY, MISSISSIPPI; YAZOO PUBLIC SERVICE COMMISSION; WILLIAM BARBOUR; TOM CAMPBELL, JR.; E. A. SMITH; WILLIAM T. NEELY AND JOEL STEVENSON,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

VARDAMAN S. DUNN
(Counsel of Record)
COX & DUNN, LTD.
Post Office Box 1046
Jackson, Mississippi 39205
(601) 354-3783

MICHAEL W. ULMER
WATKINS & EAGER
Post Office Box 650
Jackson, Mississippi 39205

HALEY BARBOUR
HENRY, BARBOUR & DECELL
Post Office Box 960
Yazoo City, Mississippi 39194
Attorneys for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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No. 83-1650

In the Supreme Court of the United States

October Term, 1983

JONEZ P. SUTHOFF, FRANCES P. MILLER AND INEZ W. PHILIBERT,

Petitioners,

vs.

YAZOO COUNTY INDUSTRIAL DEVELOPMENT CORPORATION; YAZOO COUNTY, MISSISSIPPI; YAZOO COUNTY PORT COMMISSION; YAZOO CITY, MISSISSIPPI; YAZOO PUBLIC SERVICE COMMISSION; WILLIAM BARBOUR; TOM CAMPBELL, JR.; E. A. SMITH; WILLIAM T. NEELY AND JOEL STEVENSON,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PRELIMINARY STATEMENT

This brief responds to the Petition of Jonez P. Suthoff, Frances P. Miller and Inez W. Philibert, for review on a writ of ceritorari.

Petitioners were plaintiffs in the United States District Court for the Southern District of Mississippi and are here sometimes referred to as "plaintiffs" and sometimes as "petitioners".

Respondents were defendants in the trial court and are sometimes referred to collectively as "defendants".

There are ten respondents. Five of these are public and public service bodies identified with the local government and industrial development of Yazoo County and Yazoo City, Mississippi. The remaining five respondents are individuals who are identified in one way or another with the subject matter of the case. Two are the attorneys who were employed by the plaintiffs (Neely and Barbour). One is an appraiser engaged in behalf of the plaintiffs (Stevenson). Another is an attorney for Yazoo City (Campbell).

All respondents (defendants/appellees below) join in this brief, because the one issue involved is common to all defendants.

STATEMENT OF THE CASE

This was a §1983 action, seeking recovery of damages, actual and punitive, for an alleged taking of property by fraud, duress, and abuse of process. The lower Court dealt only with a narrow issue. The issue was whether the action was time-barred, – a claim asserted defensively. The issue was presented for resolution by the motion of defendants for summary judgment. The motion was based upon the facts established by the pleadings and upon the admissions extracted from the three plaintiffs on their depositions.

Petitioners' "Statement of the Case" is mostly fiction, derived from the allegations of the Complaint and wishful thinking of counsel. The defendants dispute all claims of wrongful or fraudulent conduct and assert them to be preposterous in the extreme. For present purposes, how-

ever, these allegations produce no viable issues and are relevant only to deciding the nature of the alleged cause of action for use by the Court in selecting a statute of limitations which best fits those disputed allegations.

The limitations defense involves three questions or sub-issues and three only. These are: (1) when did the alleged cause of action accrue; (2) which statute is to be borrowed from state law; and (3) had the statute run its course before the present action was filed.

As noted in more detail later, the allegations of the untimely Complaint, filed in February, 1979, closely parallel the conviction entertained by the three plaintiffs in February, 1972, when they agreed to sell the land to Yazoo County and gave a deed in exchange for the $100,830.00 agreed price.

The factual background established by the pleadings and uncontroverted summary judgment evidence, is noted below in abbreviated form.

The action sounds in tort, alleging fraud, duress, and abuse of process, allegedly extended to five public and quasi public bodies and five individuals, all named as defendants, under a conclusory allegation of combined action or "conspiracy" to deprive the plaintiffs, three owners of a tract of land in Yazoo County, Mississippi, of their property without due process of law, contrary to the mandate of the Fifth and Fourteenth Amendments to the Constitution of the United States. The Complaint invokes 42 U.S.C. §1983.

The Complaint reflects the plaintiffs' dissatisfaction with the sale by them of a tract of land to Yazoo County in February, 1972. The tract is alleged to contain 122 acres.

On February 22, 1972, after extensive negotiations, the sale of the tract of land was closed by the execution by the plaintiffs of a deed to Yazoo County, as grantee, in exchange for $100,830.00, paid by Yazoo County and accepted by the three plaintiffs as owners. The deed is dated February 18, 1972. The sale was closed February 22, 1972. On February 16, 1979, over six years later, the present suit was filed. The Complaint asserted that the land was sold in 1972 for less than its full value, alleging, as the basis for the recovery of damages, fraud, duress and abuse of process.

Believing that the Complaint had not successfully invoked federal jurisdiction under §1983, defendants moved to dismiss under Rule 12(b)(1) and the United States District Court, expressly without reaching any other issue, dismissed the action without prejudice for want of jurisdiction. However, the Fifth Circuit reversed. *Suthoff, et al. v. Yazoo County Industrial Development Corporation et al.*, 637 F.2d 337, reh. den. 642 F.2d 822 (CA 5, 1981). Certiorari was denied, Justice Rehnquist dissenting, 454 U.S. 1157, 102 S.Ct. 1032 (1982).

On remand, the appellants filed answers denying the allegations of fraud, duress and abuse of process, and pleading, among other defenses, the bar of Mississippi statutes of limitations, waiver and laches. Plaintiff did not seek to lay the groundwork for avoidance of the time-bar plea tendered in defendants' answers by a responsive pleading.

Discovery was commenced and all of the named parties, plaintiffs and defendants, were deposed. While the depositions fail to support a cause of action on the merits, and even suggest that same is frivolous, the same depositions reflect admissions by the plaintiffs which establish the

limitations defense. Therefore, defendants limited the grounds for their motion for summary judgment to the threshold application, as a complete bar, of two Mississippi statutes of limitations.

No response to defendants' motion for summary judgment appears of record. No genuine issue of fact was developed. The District Court (Judge Walter L. Nixon, Jr.) sustained the motion and dismissed the action with prejudice, holding that the action was barred as a matter of law, under both the *one year* and the *six year* state statutes governing tort actions at common law in Mississippi.

The events leading up to the execution of the land deed in February, 1972, are noted below.

Mrs. Inez W. Philibert acquired the tract of land as devisee in the will of a friend, one E. W. Cooper, and deeded a 1/3 interest each to her two daughters, who were coplaintiffs in this lawsuit, and the three ladies owned the land in 1970.

Several appraisals of value were made, — one by Yazoo City and two by the owners, which ranged from $250.00 to $1,500.00 per acre and which varied also as to the number of "usable" acres in the tract. The land was finally sold to Yazoo County for $100,830.00, based on 99.25 usable acres, or at an average price of approximately $1,018.00 per usable acre.*

Between May, 1970, and September 2, 1971, several references to the planning, construction and location of a sewage disposal plant appeared on the minutes of the Mayor and Board of Alderman of the City of Yazoo City,

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*The entire tract was sold but the price negotiated and paid was calculated on the basis of "usable acres".

reflecting the city's interest in the land for locating a sewage plant. On September 2, 1971, the City filed its eminent domain suit to acquire a portion of the Philibert land south of the levee (82.43 acres). This is the suit which plaintiffs claimed to be a pretense and an abuse of process.

Mrs. Philibert and her two daughters had previously employed Mr. William T. Neely, a Jackson, Mississippi, attorney. When the condemnation suit was filed on September 2, 1971, Neely associated Mr. William H. Barbour, an attorney in Yazoo City. The owners made their own investigation into the value of the land. They already had listed the property with a real estate broker for sale at $1,500.00 per acre, after obtaining his own appraisal at that figure. The two attorneys then engaged a qualified appraiser, Joel Stevenson, to place a value on the land, which was close to what it later sold for.

While the City had an interest in a part of the land to establish a sewage plant, the Yazoo County Port Commission (an instrumentality of Yazoo County) had an interest in the entire Philibert tract for industrial development in the area,* if another site could be found for locating the sewage plant, and began negotiating for the purchase of the Philibert tract and also for adjacent land called the Page tract, — the plan being to make a portion of the Page tract available to the City for the sewage plant and retain the Philibert tract for industrial development if both tracts could be acquired.

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*It was asserted that the City filed the eminent domain suit to acquire the land for use by the Yazoo County Port Commission because the Commission had no expropriation powers, but, for whatever it may be worth, this is not the case. The Commission does have the power to acquire land by eminent domain. Cf. Opinion of the Fifth Circuit on Petition for Rehearing in first appeal, 642 F.2d 822 (CA 5, 1981).

Negotiations began between the attorneys for Yazoo County and the attorneys for the owners of the Philibert tract and with the owners of the Page tract, with the result that both tracts were acquired by deed to Yazoo County and the location of the sewage plant was later established by the City on the Page tract.

Although the land had been listed for sale with the broker, Mrs. Philibert and her two daughters were not enthusiastic about selling the land to Yazoo County, and in the course of the negotiations there developed in their own minds certain mental fixations which bear directly upon the issue involved here. These fixations bear upon the issue because they reflect an awareness from the beginning of the existence of the same cause of action which the plaintiffs alleged almost seven years later.

The first mental fixation was that the condemnation suit filed by the City was a fraud and a pretense only and then that they were being tricked and that their attorneys and appraiser were not properly representing their interest. While the record is devoid of any evidence to that effect, the three ladies nevertheless so concluded in their own minds as early as February, 1972, or before and never waivered in their viewpoint.

For example, appellant, Mrs. Jonez Suthoff, who was the acknowledged leader of the family group, testified on her deposition that as early as the meeting on February 3, 1972 (prior to closing the sale on February 22, 1972), she felt like the owners were being defrauded and that their attorneys were defrauding and tricking them.

Based upon the uncontroverted summary judgment evidence, the District Judge found (Apx. pp. 25a-25b):

> "The alleged cause of action accrued in February of the year 1972 when the plaintiffs executed their

Warranty Deed dated February 18, 1972, conveying the land in question to Yazoo County, Mississippi and received from the grantee the sum of $100,830.00.

"On their depositions, the plaintiffs testified to an awareness in 1971 and in 1972 of the alleged wrongs against them and during this period even attempted unsuccessfully to employ another attorney in the person of one John Poole. The Court concludes that plaintiffs either knew the facts underlying their present claims or should have known of facts to be on notice but nevertheless delayed the filing of this action for more than six years thereafter.

"There was no concealment or concealed fraud by any of the defendants and the running of the statutes of limitations was not tolled on the facts in this case.

"The plaintiffs have retained the money paid to them by Yazoo County in exchange for their deed. Yazoo County took possession of the land deeded to it and valuable improvements have been made on the property."

The bare allegations of the Complaint are not enough to create a genuine issue of fact, Rule 56(e), but in this case, the admissions found in the depositions indicate that the pleader had no respect at all for the facts actually involved.

For example, the Complaint alleges that William H. Barbour, one of petitioners' attorneys who was associated with Mr. Neely, another of plaintiffs' attorneys, was an officer in the defendant Yazoo Industrial Development Corporation (YIDC); that plaintiffs were unaware of this fact until January 25, 1979, and that had it been known, Barbour would not have been employed by plaintiffs. On this point the Fifth Circuit found:

"Plaintiffs' primary allegation in this regard is that Barbour and Neeley failed to disclose Barbour's official association with the YIDC, a fact plaintiffs claim not to have learned until January 25, 1979, approximately three weeks prior to their filing the lawsuit.

"The uncontroverted summary judgment evidence, however, taken from plaintiff Suthoff's own deposition testimony, reflects that Barbour's name was mentioned as a member of the YIDC Executive Committee in a November 10, 1971, article concerning the proposed sewage disposal plant in the People's Press, a Yazoo City Newspaper; further, that Suthoff read the article shortly after it was printed and underlined Barbour's name where it appeared in the article. Plaintiffs have not alleged that Barbour or Neely actively concealed the fact of Barbour's association with the YIDC. . ." (722 F.2d at 138)

SUMMARY OF ARGUMENT

The case involved only a single narrow issue. That issue was whether this 42 U.S.C. §1983 action was barred by the applicable statute of limitations.

The District Court selected the Mississippi one-year statute relating to "intentional" torts and, in the alternative selected the state's six-year catch-all statute. Those statutes were borrowed from state law and applied to the uncontroverted facts to dismiss the action as time-barred.

In applying the statutes of limitations, the trial Court determined, on the facts, that the cause of action accrued on February 22, 1972, when the potential plaintiffs knew or should have known of the existence and cause of the

alleged injury. The action was filed over six years later. There was no fraudulent concealment by any of the defendants. The Court of Appeals for the Fifth Circuit affirmed. A Petition for Rehearing was denied.

The case involves the sale in February, 1972 of a tract of land to Yazoo County, Mississippi, by the plaintiffs, as owners. The owners exchanged a land deed at that time for consideration of $100,830.00 in cash. That sum was received by the owners and retained and used. The potential plaintiffs continued to retain and use the purchase monies while the purchaser made valuable improvements on the land.

Plaintiffs filed this action in February, 1979, claiming that in 1972, they had been induced by fraud, duress and abuse of process to sell the land for only a fourth of its true value. Yazoo County was accused along with several other public and quasi-public bodies, plus five individuals, including lawyers on both sides of the 1972 negotiations. Damages, actual and punitive, were demanded.

According to the admissions by the plaintiffs on their depositions, they knew in February, 1972, substantially all of that which they asserted over six years later in their §1983 Complaint.

The time-bar issue involved three sub-issues, which were: (1) when did the cause of action accrue; (2) which statute should be selected; and (3) was the selected statute tolled by alleged concealed fraud.

The standards for resolving the above mentioned issues and sub-issues are now well settled. Those standards were recognized and applied to the facts distilled from the extensive discovery depositions. Those standards were not only applied; they were correctly applied to conclude: (1) that the cause of action accrued in February, 1972 when

the deed was executed; (2) that the applicable statutes were first the Mississippi *one-year* statute relating to intentional torts, and if not the one-year, then the *six-year* "catch-all" statute relating to torts in general; (3) that neither of the selected statutes was tolled on the unsupported arguments claiming the existence of concealed fraud; and (4) that either or both of the statutes serve to bar this action.

Application of limitations, borrowed from state statutes, is appropriate in §1983 actions, as has been consistently held by all courts which have considered the question, including the Supreme Court in *Board of Regents v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790 (1980).

The use of borrowed statutes of limitations does not violate the policy or purpose of the Civil Rights Act, because plaintiffs can still readily enforce their claims simply by commencing their action on time. This is especially true in the case at bar, since the plaintiffs not only over-delayed on a strictly statutory time lapse basis; they were guilty of laches as well. This is so because they stood by and continued to retain and use the proceeds from the sale while Yazoo County proceeded, without complaint, to make large expenditures for permanent improvements on the land.

No good reason has been advanced why this Court should review the routine findings of the lower courts. There are no new principles to announce or novel issues to resolve. The lower Courts simply selected a state statute to borrow by finding the one most analogous and resolved the accrual issue and the "tolling" contention on the basis of the facts. In short, petitioners have not pointed to any "special or important reasons" for granting the writ, especially since the decision is well supported by reason and authority.

ARGUMENT

I.

Preliminary Statement

Petitioners' attempt to state the questions to be presented under Rule 21.1 is defective, because the questions are not stated in the terms and circumstances of the case.

The Court of Appeals did not "disregard, overrule and convert" its previous holding as stated. The first holding dealt only with the question of jurisdiction under §1983 and related statutes. The Court found that jurisdiction existed but was careful to point out that no other issue was involved. *Suthoff v. Yazoo County Industrial Develcpment Corp.*, 637 F.2d 337, reh. den. 642 F.2d 822 (CA 5, 1981).

On the subsequent and last appeal, the issues presented to the Court of Appeals were (1) whether the action is time-barred by borrowed state statutes of limitations in this §1983 action; and (2) whether the applicable statutes were tolled by contentions of "concealed fraud" when, despite current unsupported assertions, the absence of concealment is established in point of fact without contradiction, as the lower Courts expressly found.

The District Court held that there was no genuine issue of material fact on the one and only dispositive issue involved; that the Mississippi one-year statute, barring actions for intentional torts, applied and, if mistaken, then in the alternative, that the Mississippi six-year "catch-all" statute applied; that either or both statutes served to preclude maintenance of the action; and finally, that neither the one-year nor the six-year statute was tolled on the argumentative contentions of "concealed fraud".

The selection and non-tolling conclusions reached by the District Court were affirmed on appeal by the Fifth Circuit Court of Appeals. *Suthoff, et al. v. Yazoo County Industrial Development Corporation, et al.*, 722 F.2d 133 (CA 5, 1983). No incorrect standards governing the decision or review were used by the lower Courts. No special or important questions for review appear on the surface or even lurk in the background of this case and none of the parameters of Rule 17.1 have been or can be distilled from the record in this case.

II.

The "Borrowing" Rule Relates to Use of State Statutes of Limitations

Petitioners' main argument seems to be that since the alleged tort was one of alleged constitutional proportions, state statutes cannot be used as a time bar. But no authority is cited for this contention. Indeed, the point is foreclosed by *Board of Regents v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790 (1980), in which a New York statute was held to bar a §1983 action. Since then, many cases have held that federal courts must "borrow" the state statute of limitations governing analogous causes of action. (See cases cited by the Fifth Circuit.) These cases conclude that the application of state created time-bars is not inconsistent with the federal law embodied in §1983, since plaintiffs may readily enforce their claims simply by commencing their actions on time. *Board of Regents v. Tomanio*, supra.

III.

The "Essential Nature" of the Action is the Criterion for Selecting the Right Statute

Once determined that the federal courts may borrow state statutes of limitations, the next step is one of selection. The selection process will first look to the "essential nature" of the action or gravamen of the claim and then select the statute which applies under state law to a claim that is determined to be the most analogous to the plaintiff's claim. *Prince v. Wallace,* 568 F.2d 1176 (CA 5, 1978); *Boshell v. Alabama Mental Health Board,* 473 F.2d 1369 (CA 5, 1973).

The Fifth Circuit followed this process of selection (722 F.2d at 136).

IV.

The Correct Statutes Were Selected

The essential nature of plaintiffs' claim was a mixture of alleged fraud, duress and abuse of process, all intentional torts, and closely related in nature, having in common the element of intentional conduct. In Mississippi, the one-year statutory bar, §15-1-35, Miss. Code (1972), applies to all intentional torts. *Dennis v. Travelers Insurance Co.,* 234 So.2d 624 (Miss. 1970); *Rigby v. Roadway Exp., Inc.,* 680 F.2d 342 (CA 5, 1982); *Childers v. Beaver Dam Plantation, Inc.,* 360 F.Supp. 331 (N.D. Miss. 1973); *Andrews v. GAB Business Services, Inc.,* 443 F.Supp. 510 (N.D. Miss. 1977). Therefore, the one-year statute was the first choice of the lower Court. Under the one-year statute, the action is barred six times over.

The second choice was the Mississippi six-year statute, §15-1-49, Miss. Code (1972), called the "catch-all" statute.

The action was filed over six and almost seven years after the cause of action accrued. It was barred by this statute as well.

The lower Courts made the correct selection under the proper standards. The effort by plaintiffs to invoke other statutes of longer time space was addressed by the Fifth Circuit and the cases then and now relied upon were found to be readily distinguishable (722 F.2d at 136-137).

Plaintiffs were simply unable to fit the case by analogy into any category that was not within the coverage of either the one-year or the six-year statute or both.

The new Mississippi cases cited by petitioners as authority are two from the District Court for the Southern District of Mississippi (Judge Dan M. Russell, Jr.), being *Lonnie Lee Cuevas v. Nationwide Mutual Fire Ins. Co.* (unreported) and *Ray Harris v. Combined Ins. Co. of North America* (unreported) (Apx. pp. 55a-70a), both being actions for the tortious breach of insurance contracts and claiming entitlement to "punitive damages". The Court declined to apply the one-year statute because under Mississippi law "punitive damages" could rest upon "gross negligence" and were not dependent upon the existence of an "intentional tort". These cases have no application here.

V.

The Correct "Accrual" Rule Was Applied

The lower Courts found that the cause of action "accrued" on February 22, 1972, when the land sale from petitioners was closed by execution of the land deed in exchange for the $100,830.00 in cash and the services of petitioners' attorneys terminated.

Here the Court applied the federal rule, holding that the action accrued when petitioners knew or had reason to know of the injury which is the basis of the action. *Cox v. Stanton*, 529 F.2d 47 (CA 4, 1975); *Lavellee v. Listi*, 611 F.2d 1129 (CA 5, 1980). The Fifth Circuit found that the District Court properly found this accrual time to be February 22, 1972. This was based on the uncontroverted facts that at that time petitioners were convinced in their own minds that they had been tricked and defrauded by all concerned, including their own attorneys.

VI.

The Correct "Tolling" Rule Was Applied

Petitioners have asserted that the running of the statutory time was tolled by "concealed fraud". But the admissions of petitioners in the course of their deposition testimony showed without question or contradiction that petitioners knew on February 22, 1972, substantially all of that which they now assert and the lower Courts so found (722 F.2d at 137-138). Besides this, petitioners filed a formal Complaint with the Mississippi State Bar in 1975, making substantially the same claims as now form the basis of the present action, and still continued to delay action until February 16, 1979 (722 F.2d at 138). The Fifth Circuit concluded:

> ". . . We do not find that the plaintiffs have raised a fact issue of fraudulent concealment within Miss. Code Ann. §15-1-67 (1972)." (722 F.2d at 138)

The attorney-client relationship between plaintiffs and their attorneys (Neely and Barbour) ended on February 22, 1972, and there is not even a claim that the attorneys concealed anything after that date. A series of new attorneys advised with plaintiffs after February 22, 1972.

VII.

Application of State Statutes of Limitation Does Not Adversely Affect Policies of Civil Rights Legislation

This subject was dealt with by the Court in *Board of Regents v. Tomanio,* 446 U.S. 478, 100 S.Ct. 1790 (1980). Applying a state statute of limitations in an action under the Civil Rights Act of 1871 and citing *Robertson v. Wegmann,* 436 U.S. 584, 98 S.Ct. 1991 (1978), the Court said:

> ". . . The Court went on to identify two of the principal policies embodied in § 1983 as deterrence and compensation. Neither of these policies is significantly affected by this rule of limitations since plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within three years." (100 S.Ct. at 1797)

Not only in the case at bar did the petitioners wait more than six years to file this action, but they stood by, without complaint, and watched Yazoo County place valuable improvements on the land. (See Opinion of District Court, quoted supra).

VIII.

The Case Was Ripe for Summary Judgment

Petitioners make many assertions in the Complaint, most of which are conclusory only. Counsel continues to make and even expand upon some of these assertions in the brief, as if same were factual, when, in truth, the facts, derived from the sworn admissions of petitioners on their own respective depositions, are just the opposite. The lower Courts plowed through the massive depositions to

harvest the uncontradicted facts relevant to the plea of the statute of limitations and relevant to the "tolling" assertion and set these forth clearly in their respective opinions.

Petitioners cannot refute the uncontroverted summary judgment evidence by merely pointing to allegations in the pleadings. As stated in *First Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575 (1968):

> ". . . What Rule 56(e) does make clear is that a party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him. . . ." (88 S.Ct. at 1592-1593)

IX.

There Is No Conflict With Decisions of the Supreme Court or Other Courts

Petitioners' reliance on *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352 (1979) is misplaced because the facts are that plaintiffs were aware of the claimed existence and cause of injury in February, 1972. In that case, a medical malpractice suit, the Court held that when one has notice of the fact and cause of injury, the "accrual" of a claim need not await awareness by the plaintiff that his injury was wrongfully inflicted in terms of creating a cause of action. In the case at bar, plaintiffs knew they had sold their land and knew its value as well as anyone could know it and knew that they had been persuaded to sell over their protests. As to the alleged wrongful action of the defendants, Mrs. Suthoff admitted that she and her co-owners were convinced at the time that the owners had been tricked and defrauded. They even said as much in their formal Complaint to the State Bar in 1975, after

which the one-year statute ran four times over and there was several years grace left in the six-year statute before the action became barred.

Finally, *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018 (1949) does not support petitioners' case. This case was an action under the Federal Employers Liability Act for disability resulting from silicosis, which manifested itself only after thirty years of exposure to silica dust. The Court held that the cause of action accrued when the accumulated effects manifested themselves. There is no analogy to the case at bar, because the plaintiffs knew in February, 1972 substantially all that they now allege as the basis for their alleged cause of action, and the lower Courts so held. If they had any injury, it manifested itself in February, 1972 when the owners gave a deed in exchange for $100,830.00, which they have not offered to return and they have continued to retain and use.

Petitioners seem to rely heavily upon *Harrison v. United States*, Appendix pages 71a-92a, a Fifth Circuit opinion decided July 5, 1983. This was another medical malpractice case where the cause of plaintiff's physical problem was hidden from view and hence undiscoverable by reasonable effort. It is a factual stranger to the case at bar and because of this, was not followed by the Fifth Circuit in the instant case, where the plaintiffs had full knowledge of what they now alleged to be the "fault" of defendants. It was not necessary that plaintiffs view the "fault" as legally actionable at the time that the sale was closed in 1972. As pointed out in *Harrison v. United States*, supra: "The plaintiff need not have knowledge of fault in the legal sense for the statute to begin to run. . ." (Apx. p. 87a) See also *United States v. Kubrick*, supra.

X.

There Are No Questions Which Warrant Review

Petitioners argue the case much as they did before the Court of Appeals and make no serious attempt to explain why the merits of the several contentions should be reviewed by this Court.

Therefore, we can say in response only that the Court of Appeals determined (1) that certain facts were established; (2) that the facts relevant to the narrow limitations issue were uncontroverted and no genuine issue there as to remained; (3) that certain legal standards were settled for dealing with the issues and (4) that the law resulting from the application of those standards, when applied to the facts, justified entry of a summary judgment of dismissal.

There are no new principles to announce or novel issues to resolve. The lower Courts simply selected a state statute to borrow by finding the one most analogous and resolved the "tolling" contention on the basis of the uncontested facts. In short, petitioners have not pointed to any "special or important reasons" for granting the writ, especially since the decision is well supported by reason and authority.

CONCLUSION

The respondents respectfully submit that the Petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

VARDAMAN S. DUNN

Attorney for Yazoo Industrial Development Corporation, Yazoo County, Mississippi, and Yazoo County Port Commission

MICHAEL ULMER

Attorney for Respondents Yazoo City, Mississippi, Yazoo Public Service Commission, Tom Campbell, Jr. and E. A. Smith

HALEY BARBOUR

Attorney for Respondents William H. Barbour, William T. Neely and Joel Stevenson